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No. _____

In The

SUPREME COURT OF THE UNITED STATES

GREG RUTHERFORD, Butte County Sheriff's Deputy, MICK GREY, Butte County Sheriff, and COUNTY OF BUTTE,
Petitioners,

vs.

RICHARD LEO DEORLE
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Richard Leo Deorle, *Plaintiff-Appellant*, v. Greg Rutherford, Butte County Deputy Sheriff; Mick Grey, Butte County Sheriff; County of Butte, *Defendants-Appellees.*	No. 99-17188 D.C. No. CV-97-434-LKK ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Argued and Submitted
December 12, 2000 – San Francisco, California

Filed March 16, 2001
Amended Opinion Filed August 31, 2001
Second Amended Opinion Filed November 19, 2001

Before: Myron Bright,* Stephen Reinhardt, and
Barry G. Silverman, Circuit Judges.

Opinion by Judge Reinhardt;
Dissent by Judge Silverman

*The Honorable Myron Bright, Senior United States Circuit Judge for the Eight Circuit, sitting by designation.

ORDER

The majority opinion filed March 16, 2001, as amended August 31, 2001 is further amended as follows:

1) On slip opinion p. 11965, in the paragraph following heading "A. Nature and Qualified Intrusion", replace the citation "*Headwaters Forest Def. v. County of Humbolt*, 240 F.3d 1185, 1198 (9th Cir. 2000) (internal quotation marks omitted) (quoting *Chew*, 27 F.3d at 1440)" with:

"*Headwaters Forest Def. v. County of Humbolt*, 240 F.3d 1185, 1198 (9th Cir. 2000) (vacated and remanded on other grounds sub nom. *County of Humbolt v. Headwaters Forest Def.*, 122 S.Ct. 24 (2001)) (internal quotation marks omitted) (quoting *Chew*, 27 F.3d at 1440)."

2) Replace the paragraph beginning at the bottom of slip opinion p. 11976 with:

> "Although there is no prior case prohibiting the use of this specific type of force in precisely the circumstances here involved, that is insufficient to entitle Rutherford to qualified immunity: notwithstanding the absence of direct precedent, the law may be, as it was here, clearly established. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (rejecting the notion that officer liability cannot exist "unless the very action in question has previously been held unlawful"). Otherwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct. When " 'the defendant['s] conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts' that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established." *Mendoza v. Block*, 27 F.3d 1357, 1361

> (9th Cir. 1994) (quoting *Castell v. Pieschek*, 3 F.3d 1050, 1053 (7th Cir. 1993)). This is such a case. No reasonable officer could have believed that Rutherford's action in shooting Deorle with the "less lethal" lead-filled beanbag round was appropriate or lawful. To the contrary, "it would be clear to a reasonable officer that [Rutherford's] conduct was unlawful. *Katz*, 121 S.Ct. at 2158. It does not matter that no case of this court directly addresses the use of such weapons; we have held that "[a]n officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury." *Mendoza*, 27 F.3d at 1362. Given all the circumstances, the error in judgment, such as it was, does not constitute a "reasonable mistake" of fact or law on Rutherford's part. Viewing the facts in the light most favorable to the plaintiff, Rutherford was not entitled to qualified immunity for his use of excessive force."

Judge Reinhardt has voted to deny Petition for Rehearing En Banc, and Judge Bright has so recommended. Judge Silverman has voted to grant the Petition for Rehearing En Banc.

The full court was advised of the Petition for Rehearing En Banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the active judges in favor of en banc consideration. Fed. R. App. P. 35.

The Petition for Rehearing En Banc is therefore denied.

OPINION

REINHARDT, Circuit Judge:

Police Officer Greg Rutherford fired a "less lethal" lead-filled "beanbag round" into the face of Richard Leo Deorle, an emotionally disturbed resident of Butte County, California, who was walking at a "steady gait" in his direction. He did so although Deorle was unarmed, had not attacked or even touched anyone, had generally obeyed the

instructions given him by various police officers, and had not committed any serious offense. Rutherford did not warn Deorle that he would be shot if he physically crossed an undisclosed line or order him to halt. Rutherford simply fired at Deorle when he arrived at a spot Rutherford had predetermined. The projectile Rutherford fired removed Deorle's eye and left lead shot implanted in his skull. We are presented on appeal with two questions: whether the force used was excessive; and, if so, whether Officer Rutherford is nevertheless entitled to qualified immunity because the law was not clearly established or because the officer made an objectively reasonable error in judgment. Both inquiries are a part of the qualified immunity issue on which the district court granted Rutherford summary judgment.

BACKGROUND[1]

On September 9, 1996, in Butte County, California, Richard Deorle (Deorle), upset at being diagnosed with Hepatitis C, and having consumed a half-pint of vodka and some Interferon, his prescribed medication, began behaving erratically. By four o'clock, Deorle had become suicidal. According to Mrs. Deorle, having "lost control of himself," Deorle began screaming and banging on the walls of their house. In search of someone to help her with her distressed husband, Mrs. Deorle dialed 911.[2]

Her call was answered by the police, who dispatched Officer Mahon to the Deorle residence. Mrs. Deorle, accompanied by their children, left the house. Deorle did not hinder their departure. He did, however, rather angrily, refuse to let Mahon enter the house without a warrant. Mahon escorted Deorle's family one block from their house, radioed for "Code 3 Backup," and requested that more officers be sent

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[1] When we review an order granting summary judgment to the defendant, we must view the relevant facts in the light most favorable to the plaintiff. *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998). That standard also applies to our determination of the defendants' entitlement to qualified immunity as a matter of law. *See Moran v. Washington*, 147 F.3d 839, 844 (9th Cir.1998)

[2] Mrs. Deorle testified that, when she dialed 911, Deorle was "just screaming. I don't remember any words, just screaming like in pain." She picked up the phone intending to get medical help, dialed 911, and left the phone on the dresser.

quickly.

At least 13 officers responded to Mahon's request for "backup."[3] These officers set up roadblocks on the streets around the house to ensure that Deorle had no avenue of escape,[4] and awaited the arrival of a Special Incident Response Team ("SIRT") and a team of negotiators. SIRT members are trained to "arrest . . . suspects in the most efficient and least hazardous manner . . . [and] arrest suspect[s] with a minimum amount of risk or danger to the . . . suspect." Negotiators are "[d]eputies trained in the specialized area of crisis negotiations. . . . Their role as negotiator is essential to the successful resolution of critical incidents as it relates to conflict resolution."[5]

Deorle, though verbally abusive, was physically compliant and followed all the officers' instructions. When a canine team "tested" his behavior by making their dog bark aggressively at Deorle, he retreated towards his house. When a wooden board from the porch railings came away in his hands, Deorle dropped it at the officers' command. Although shouting "kill me" and brandishing a hatchet at a police officer, he threw the hatchet away into a clump of trees when told to put it down. Still, Deorle remained agitated and continued to roam on or about the property but well within the police roadblocks. Officer Rutherford, who was at the scene for thirty to forty minutes, did not observe Deorle touch, let alone attack, anyone; nor had he received any

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[3] Rutherford, claims there were between five and ten police officers at Deorle's residence. Appellees' evidence in support of their summary judgment motion suggests that at least thirteen officers were at the scene when Deorle was shot, and a police log indicates that as many as 24 officers may have been present before or immediately after the shooting.

[4] According to the affidavit testimony of various police witnesses, the police secured the area along Creston Road in front of Deorle's house by establishing two roadblocks, one at the intersection of Creston and Sherwood, where Officers Mahon, Muldown, and Collins were stationed, and one at the intersection of Creston and Skyway, staffed by at least two officers, including Officer Hard, but possibly also Sergeant Estes and Officer Johnson. Various officers observed Deorle, who walked up and down Creston Road from one police roadblock to the other and periodically returned to his property or his house.

[5] Butte County Sheriff's Department Special Incident Response Team Tactical Manual at 9, 2.

report of any such action on Deorle's part. He did, however, hear Deorle scream at him that he would "kick his ass."

Rutherford was a member of the SIRT team. He was trained in the deployment of force against recalcitrant suspects and had arrived on the scene in response to Mahon's Code 3 call. After a briefing by his superiors and consultation with another officer on the scene, he decided to reconnoiter closer to Deorle, although the negotiators assigned to handle the incident had not yet arrived. Accompanied by officers Estes and Nichols, Rutherford observed Deorle for about five to ten minutes from the cover of some trees before Deorle, carrying an unloaded plastic crossbow in one hand[6] and what may have been a can or a bottle of lighter fluid in the other,[7] started shouting at the officers. Rutherford was armed with a twelve-gauge shotgun loaded with what appellees term a "less-lethal" or "beanbag" round. These rounds are made of lead shot contained in a cloth sack, and are small enough to be fired from a shotgun.[8] The rounds "could have lethal capabilities" at thirty feet, and are potentially lethal at up to fifty feet.[9]

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[6] The dissent says that it is unclear whether the crossbow was loaded. If it were unclear, we would be required to assume for purposes of summary judgment that it was not loaded. Here, however, Rutherford, himself, acknowledged that the crossbow was unloaded when he observed Deorle. *See* Transcript of Deposition of Greg Rutherford, dated July 29, 1998 at 60:25-26.

[7] In his deposition, Rutherford testified at various times that he observed a plastic bottle in Deorle's hand, but stated equally unequivocally at other points that it was a can that he observed. He also stated that it was lighter fluid that Deorle was carrying because he could tell that from the type of container in Deorle's hand. Indeed, in his deposition, Rutherford said that he could distinguish what type of lighter fluid it was – charcoal lighter fluid rather than that used to fill cigarette lighter – because of its container (apparently, whether that container was a can or a plastic bottle). We also note that Rutherford observed the can or bottle at a distance of more than thirty feet.

[8] The shot is enveloped in cloth to prevent its spreading and peppering the target. The shot, thus encased, is expelled from a twelve-gauge shotgun at a speed of between 280 and 300 feet per second, and delivers a force sufficient to knock someone off his feet and render him incapable of resistance.

[9] Transcript of Deposition of Greg Rutherford, dated July 29, 1998, at 99:23-24.

In response to Deorle's taunts, Rutherford shouted at him to put down the crossbow and Deorle "discarded" it.[10] According to Rutherford, Deorle:

> walk[ed] directly at me at a steady gate [sic]. . . . He didn't run at me, he didn't take his time getting to me, it was just a steady walk directly at me. . . .Once he started walking towards me I took a little wider stance with my feet to get a good stable base. As I leaned my weapon up against the tree to make it more stable and I focused on his lower right rib area as he was walking towards me for a target area.[11]

Rutherford had stationed himself in a garden adjacent to Deorle's house and on its east side. He waited until Deorle, who was walking in an easterly direction on his own property, reached a

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[10] Nowhere in the record is there any mention of any other instruction or order given by Rutherford, or any suggestion that Rutherford told him to drop the bottle or can.

[11] In a statement given to Sergeant Nickelson of the Oroville Police Department on the day in question, Rutherford stated that just prior to shooting Deorle he observed him at a distance of forty feet. Deorle was returning to the grounds of his house from the Sherwood roadblock situated to the west of the house. Rutherford had positioned himself behind a tree in a garden on the east side of the house, between Deorle's property and the Skyway roadblock. According to Sgt. Nickelson, Rutherford told him that he was concerned about "a hostage possibility." "He [Rutherford] said that he was not going to retreat, he knew that he was in a good, secure position. . . . He could not tell if the crossbow was loaded . . . Deputy Rutherford said he already believed that less than lethal rounds would be reasonable use of force in this situation. . . . Deputy Rutherford observed the suspect throw the cross bow to the ground . . . [T]he suspect kept coming closer to him and when the suspect went passed [sic] a similar sized tree, approximately 30 feet away from him, he decided that the subject had approached and was in an uncomfortable position for him. Deputy Rutherford felt he was in jeopardy and if he passed the tree, that he would shoot the subject. Deputy Rutherford said the weapon had already been aimed at the suspect when he noticed him approaching with the cross bow. He said that when the subject got passed [sic] the tree, he shot the round at the subject." Although, after discarding the crossbow, Deorle still possessed a bottle or a can, it appears from Nickelson's report that Rutherford was unable to determine the nature of the container's contents at the time he shot Deorle, and that (be it a bottle or a can) Deorle's possession of the item did not constitute a factor, let alone a significant one, in Rutherford's decision to shoot.

predetermined point, then fired. He did not warn Deorle that he was going to shoot him. He did not ask him to drop the bottle or can. Nor did he order him to halt. The cloth-cased shot struck Deorle in the face, knocked him off his feet, and lodged "half out of his eye." Deorle suffered multiple fractures to his cranium, loss of his left eye, and lead shot embedded in his skull. A team of negotiators was still en route at the time Rutherford shot Deorle.

Deorle sued Rutherford, Mick Grey (the Butte County Sheriff), the County of Butte, and Defense Technology Corporation (the manufacturer of the cloth-cased shot), for, among other things, excessive force in violation of the fourth amendment. Rutherford and Grey asserted qualified immunity and moved for summary judgment. The district court held that Rutherford was entitled to qualified immunity, that he did not violate Deorle's right to be free from excessive force, and that there was therefore no basis for holding the other defendants liable. The court granted summary judgment for defendants and denied Deorle's motion for reconsideration. This appeal followed.[12]

STANDARD OF REVIEW

A court reviews de novo the district court's determination regarding qualified immunity. *See Robinson v. Prunty*, 249 F.3d 862, 865-866 (9th Cir. 2001). A district court's decision to grant summary judgment is also reviewed de novo. *See Crow Tribe of Indians v. Raciot*, 87 F.3d 1039, 1043 (9th Cir. 1996).

DISCUSSION

[1] The Supreme Court has recently determined the manner in which courts are to proceed when, in an excessive force case brought under 42 U.S.C. § 1983, government officials assert the defense of qualified immunity. *See Saucier v. Katz*, ___ U.S. ___, 121 S. Ct. 2151 (2001). A court must "consider[ ] in proper sequence" the "requisites of a qualified immunity defense." *Id.* at 2155. First the court must determine, as a "threshold question," whether the plaintiff has shown

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[12] The excessive-force claim against Officer Rutherford, which reaches us in the form of a challenge to the court's qualified immunity ruling, is the only issue on appeal.

the deprivation of a constitutional right. *Id.* at 2156. *See also Wilson v. Layne*, 526 U.S. 603, 609 (1999). If so, the court must then determine whether the right violated was clearly established in a "particularized . . . sense: . . . the relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Katz*, 121 S. Ct. at 2156. Accordingly, we first examine whether the force used to subdue Deorle was excessive as a matter of law.

I. Excessive Force

[2] We examine the use of force to effect an arrest in light of the Fourth Amendment's prohibition on unreasonable seizures. *Graham v. Connor*, 490 U.S. 386 (1989); *Chew v. Gates*, 27 F.3d 1432, 1440 (1994). The officer's actions are measured by the standard of objective reasonableness, *Graham*, 490 U.S. at 397. The reasonableness of the force used to effect a particular seizure, is determined by "careful[ly] balancing . . . 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' at stake." *Graham*, 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). As we have held, "[t]he force which [i]s applied must be balanced against the need for that force." *Liston v. County of Riverside*, 120 F.3d 965, 976 (1977). *See also Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367 (9th Cir. 1994).

A. Nature and Quality of Intrusion

We first assess the quantum of force used to arrest Deorle by considering "the type and amount of force inflicted." *Headwaters Forest Def. v. County of Humbolt*, 240 F.3d 1185, 1198 (9th Cir. 2000) (vacated and remanded on other grounds sub nom. *County of Humbolt v. Headwaters Forest Def.*, 122 S.Ct. 24 (2001)) (internal quotation marks omitted) (quoting *Chew*, 27 F.3d at 1440). In the instant case, Rutherford shot Deorle using a lead-filled, "less-lethal" round.[13] This cloth-cased shot, which is something akin to a rubber bullet, is defined

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[13] The appellees also call the cloth-cased shot a "beanbag" round. That euphemism grossly underrates the dangerousness of this projectile. The round is not some sort of "hackey-sack." It is a projectile capable of inflicting serious injury or death, rather than some children's toy.

as a "long-range impact weapon."[14] It is fired from a 12-gauge shotgun, and calculated to stop "people who are violent or hostile and are threatening injury or death to themselves or others." By Rutherford's own admission, the cloth-cased shot was potentially lethal at thirty feet and could be lethal at distances up to fifty feet. Also by Rutherford's own admission, "[t]he target area for lethal capabilities would probably be the facial area. . . . If it impacted at the heart it could stop the heart or possibly tear a vital artery." Rutherford shot at Deorle's torso from thirty feet: the round hit Deorle in the head and removed his left eye and lodged pieces of lead shot in his skull.

The force used was obviously enough to cause grave physical injury. It knocked Deorle off his feet, and removed one of his eyes. The force applied through use of the cloth-case shot can kill a person if it strikes his head or the left side of his chest at a range of under fifty feet. Such force is much greater than that applied through the use of pepper spray, *see Headwaters Forest*, 240 F.3d at 1203, or a painful compliance hold, *see Forrester v. City of San Diego*, 25 F.3d 804, 806 (9th Cir. 1994)(police force's "pain compliance unit" dispersed demonstrators using "Orcutt Police Nonchakus" – two sticks of wood connected at one end by a cord – or using wrist-and arm-twisting and pressure point holds), and more likely to cause a life-threatening injury than most dog bites. *See Vera Cruz v. City of Escondido*, 139 F.3d 659, 663 (9th Cir. 1997).

[3] However, the cloth-cased shot falls short of deadly force as defined in this circuit: "that force which is reasonably likely to cause *death*." *Vera Cruz*, 139 F.3d at 663 (emphasis added).[15] The shot is not like a regular bullet – it does not normally rip through soft tissue and bone on contact with the human body. It is designed to knock down a

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[14] *See* the affidavit of Peter A. Reedy, a Sergeant with the Sacramento Department Force for 20 years, dated March 16, 1999, and file[illegible]n support of Deorle's opposition to defendants' motion for summary judgment.

[15] The extremely high deadly-force standard enunciated in *Vera Cruz* is unique to this circuit. *See id.* at 662-663. In other circuits the standard is "a substantial risk of causing death *or serious bodily injury*." *See id.* at 661 (emphasis in original), 663 (citing *Ryder v. City of Topeka*, 814 F.2d 1412, 1416 n.11 (10th Cir. 1987); *Pruitt v. City of Montgomery*, 771 F.2d 1475, 1479 n.10 (11th Cir. 1985); *Robinette v. Barnes*, 854 F.2d 909, 912-913 (6th Cir. 1988)).

target, rendering the individual incapable of resistance, without (in the normal course of deployment) resulting in death. Nonetheless, the cloth-cased shot constitutes force which has the capability of causing serious injury, and in some instances does so.[16] According to the affidavit of Sergeant Reedy, "[t]he Use of Force Continuum, as used in California, would list an impact weapon high on the schedule of force."[17] Such force, though less than deadly, is not to be deployed lightly. To put it in terms of the test we apply: the degree of force used by Rutherford is permissible only when a strong governmental interest compels the employment of such force.

B. Governmental Interests at Stake

[4] We measure the governmental interests at stake by evaluating a range of factors: they include " '(1) the severity of the crime at issue, (2) whether the suspect pose[d] an immediate threat to the safety of the officers or others . . . (3) whether he [was] actively resisting arrest or attempting to evade arrest by flight,' and any other 'exigent circumstances [that] existed at the time of the arrest.' " *Headwaters Forest*, 240 F.3d at 1198-99 (quoting *Chew*, 27 F.3d at 1440-1441 & n.5). These factors, however, are simply a means by which to determine objectively "the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97.

[5] The character of the offense is often an important consideration in determining whether the use of force was justified. *See Chew*, 27 F.3d at 1442 & n.9; *Headwaters Forest*, 240 F.3d at 1204-1205 (same). In this case, the officers were initially on, or attempting to enter, Deorle's property without a warrant. They arrived, not to arrest him, but to investigate his peculiar behavior. Deorle was clearly a deeply troubled, emotionally disturbed individual. Mrs. Deorle testified that pain, induced by a reaction to his medication, had driven Deorle

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[16] *See, e.g., Student Who Lost Eye Was Shot by Police Using "Non-Lethal Weapon*, S. F. Chron., Apr. 10, 2001 at D 6 (The student was simply observing a riot that occurred following the loss of an NCAA final four basketball game by the University of Arizona when an officer shot him with a "beanbag" round).

[17] Sergeant Reedy offered his expert opinion that "[i]t would be unreasonable for an officer to use an impact weapon on an unarmed person."

"out of control. He just didn't want to live any more." Deorle repeatedly asked officers to shoot him. Lt. Estes, reported that Deorle shouted he "[ha]d no reason to live . . . that the pain was unbearable, and that he wanted to be done with the pain, and that there was no use in continuing." Officer Johnson, Rutherford's superior, heard Deorle asking other officers to kill him. Ultimately, Deorle was charged with nothing more than obstructing the police in the performance of their duties. *See* Cal. Pen. Code § 69.

[6] Rutherford observed Deorle at close proximity for about five to ten minutes before shooting. His testimony is that he fired his shotgun as Deorle was walking towards him, at a steady gait, carrying only a bottle or a can in his hand.[18] Rutherford, who was supposed to be reconnoitering and gathering information for the SIRT team to help determine the nature of the response, instead concluded that he occupied a secure position, that he would not retreat from that position, and that he would shoot if Deorle came within a certain range. He steadied himself against a tree, and waited until Deorle reached that point; then, without a command to stop or a warning that force would be employed, pulled the trigger.

[7] A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury. There must be other significant circumstances that warrant the use of such a degree of force at the time it is used. *See Headwaters Forest*, 240 F.3d at 1203 (the fact that the police defendants were increasingly frustrated by the protesters – who had developed techniques such as lock-down devices to prolong nonviolent civil protests – is irrelevant under *Graham*). Rutherford testified in his deposition that he shot Deorle to prevent the latter from passing him and thereby posing a menace to Rutherford, the public and other officers.[19] However, a simple statement by an officer that he

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[18] Deorle was wearing no shirt or shoes, only a pair of cut-off jeans shorts. There was nowhere for him to secrete any weapons.

[19] We note that there are certain conflicts between the reasons Rutherford provided to Sergeant Nickelson on the day of the shooting and those that he provided during his deposition. In particular, he initially told Sgt. Nickelson that he believed that Deorle might take a neighbor hostage. Furthermore, he did not identify the can or bottle Deorle was carrying, or its contents, as placing him in any particular danger;

fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern. In short, an officer's use of force must be objectively reasonable based on his contemporaneous knowledge of the facts. Here, as Rutherford knew, Deorle had discarded his crossbow following Rutherford's instructions to do so, and carried only a bottle or a can with him at the time he was shot. A thorough review of the record reveals that the facts are sufficiently unclear as to what Rutherford believed or feared – reasonable or not – that the determination must be made by a trier of fact, and not, as the dissent does, by portraying the facts in the light most favorable to the moving party.

[8] Rutherford's statements must be considered in light of the objective facts and circumstances. Among them are the following: Rutherford had consulted with his senior officers before deciding to reconnoiter. He knew that roadblocks prevented Deorle leaving the area in front of his house – the area in which he was walking back and forth from time to time – and that a number of officers were stationed at each roadblock. During the forty minutes he had spent at the scene, Rutherford had not observed Deorle attack anyone; nor had he received any report that Deorle had engaged in any such conduct. Deorle had roamed about the area and shouted in an irrational manner, but had not harmed or attempted to harm anyone. Nor had he attempted to flee or escape. "[D]eputies trained in . . . crisis negotiations . . . [whose] role is essential to the successful resolution of critical incidents" were on their way. Rutherford was stationed in a secure position behind a tree, his line of retreat was clear, and Officer Nichols was stationed almost immediately behind him. Rutherford could easily have avoided a confrontation, and awaited the arrival of the negotiating team by retreating to his original position behind the roadblock. Nothing in the record before us suggests that Rutherford considered other, less dangerous, methods of stopping Deorle. *See Headwaters*

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rather, he said, the threat came from Deorle's approach to within thirty feet. By the time of his deposition, Rutherford made no mention of a potential hostage situation, instead stating that he was afraid Deorle would approach a police roadblock, staffed by a number of police officers, which separated Deorle from members of the public. In addition, he firmly identified the can or bottle of lighter fluid as the principal source of his anxiety, and he said that "if [Deorle] got passed [sic] me . . . he could harm . . . myself and other officers," as well as neighbors and bystanders.

Forest, 240 F.3d at 1204 (holding that, before deploying pepper spray, police "were required to consider '[w]hat other tactics if any were available' to effect the arrest"); *Chew*, 27 F.3d at 1443.[20] Rutherford had not seen any bystanders in the immediate area; as far as he was aware, the only neighbors in the vicinity, along with the other police officers, were safely behind the two roadblocks. In sum, the crime being committed, if any, was minor and the danger to Rutherford and others appears to have been minimal, as was the risk of flight. There was no immediate need to subdue Deorle before the negotiators who were part of the response group could arrive and perform their "essential function"; nor had those in charge made a decision to subject Deorle to the use of physical force rather than await their arrival. Considering all the circumstances at the time Rutherford fired, the governmental interest in using force capable of causing serious injury was clearly not substantial.

C. Weighing the Conflicting Interests

Whether Rutherford's shooting of Deorle was objectively reasonable requires us to consider whether the degree of force used was necessary, *see Liston*, 120 F.3d at 976, in other words, whether the degree of force used was warranted by the governmental interests at stake. *See Graham*, 490 U.S. at 396. Here, given all the circumstances – the large number of police officers present, the pending arrival of the negotiators "essential to resolve [such] critical incidents"; the nature of Deorle's conduct (essentially disturbing the peace); Deorle's compliance with the prior commands of the officers; the absence of any physical assault; Deorle's having discarded the crossbow when told to do so and being unarmed at the time he was fired upon – the fact that Deorle was walking on his own property in Rutherford's direction with a can or bottle in his hand is insufficient by any objective measure to justify the force deployed. Our conclusion is strongly supported by Rutherford's failure to give Deorle any warning that he would be shot if he

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[20] We note, incidentally, that other officers used a police dog to provoke Deorle: a "police tactic that needlessly or unreasonably creates a dangerous situation necessitating an escalation in the use of force," and a course of action this circuit has expressly refused to endorse. *See Cunningham v. Gates*, 229 F.3d 1271, 1291 n.23 (9th Cir. 2000).

approached any closer, or any order to drop the can or bottle or stop where he was: Deorle certainly could not have been expected to comply with instructions that were never given to him.

[9] The problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense. In the former instance, increasing the use of force may, in some circumstances at least, exacerbate the situation; in the latter, a heightened use of less-than-lethal force will usually be helpful in bringing a dangerous situation to a swift end. In the case of mentally unbalanced persons, the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis. *See Alexander*, 29 F.3d at 1366 (holding that the police used excessive force, considering all the circumstances, in "storm[ing] the house of a man whom they knew to be a mentally ill . . . recluse who had threatened to shoot anybody who entered").[21] Even when an emotionally disturbed individual is "acting out" and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual. We do not adopt a per se rule establishing two different classifications of suspects: mentally disabled persons and serious criminals. Instead, we emphasize that where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed.

We also recognize that police officers' decisions about the

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[21] In fact, we suggested that the plaintiff could properly argue at trial "that if the police had halted their activities and then gotten an arrest warrant, this too might have avoided the final tragic confrontation. Given the delay attendant in obtaining the warrant, the police might well have sent the gathered city officials away, and then, without the pressure of their presence, and without the expectation that an inspection could be conducted any time soon, might have allowed events to unfold more slowly." *Id.* at 1365. In other words, we suggested that the waiting period was likely to diffuse a potentially violent situation and prevent loss of life, rather than the contrary.

appropriate amount of force to use in a given circumstance "are often . . . split-second judgments [made] in circumstances that are tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 396-97; *see also Washington v. Lambert*, 98 F.3d 1181, 1186 (9th Cir. 1996). However, the situation here was far from that of a lone police officer suddenly confronted by a dangerous armed felon threatening immediate violence: Deorle was eventually charged only with the relatively minor crime of obstructing the police in their effort to subdue him. Rutherford and a host of other officers were at the scene for over half an hour before Rutherford shot the emotionally disturbed Deorle. Rutherford had had an opportunity to observe Deorle for a considerable period of time prior to firing at him. He also had the opportunity to consult with his superiors concerning the tactics to be employed. *Compare Chew*, 27 F.3d at 1142. Moreover, Rutherford possessed a clear line of escape from the position he assumed and a police roadblock or buffer zone had been established behind him. Rutherford and the other officers were awaiting the arrival of skilled negotiators, trained to persuade individuals like Deorle to submit peacefully. The negotiating team had left the station and was on its way to the scene. Nevertheless, Rutherford contemplated shooting Deorle with the "less lethal" round during the entire time Deorle was walking in his direction from the roadblock. In sum, with knowledge of all the relevant circumstances, Rutherford made a calculated and deliberate decision to shoot Deorle when Deorle reached a particular point in his peregrinations: and that is precisely what he did.

[10] The absence of a warning or an order to halt is also a factor that influences our decision. Shooting a person who is making a disturbance because he walks in the direction of an officer at a steady gait with a can or bottle in his hand is clearly not objectively reasonable. Certainly it is not objectively reasonable to do so when the officer neither orders the individual to stop nor to drop the can or bottle, and does not even warn him that he will be fired upon if he fails to halt. Appropriate warnings comport with actual police practice. Our cases demonstrate that officers provide warnings, where feasible, even when the force used is less than deadly. *See Brewer v. City of Napa*, 210 F.3d 1093, 1094-1095 (9th Cir. 2000)(police officer gave warning before setting dog on suspect); *Vera Cruz*, 139 F.3d at 660 (same); *Headwaters Forest*, 240 F.3d at 1193-94 (police warned protesters before use of pepper spray). We do not hold, however, that warnings

are required whenever less than deadly force is employed. Rather, we simply determine that such warnings should be given, when feasible, if the use of force may result in serious injury, and that the giving of a warning or the failure to do so is a factor to be considered in applying the *Graham* balancing test. In the present case, the desirability and feasibility of a warning are obvious. Deorle might never have passed the unannounced, pre-determined spot selected by Rutherford had Rutherford given him a warning or a command to halt. There was ample time to give that order or warning and no reason whatsoever not to do so.[22]

[11] Viewing the facts presented by the record in the light we must, we conclude that even though Rutherford used force that is classified in this circuit as less than deadly, and that would have been so classified in other circuits as well, the force was excessive compared to the governmental interests at stake. The dissent insists that the undisputed fact is that the force used against Deorle is not reasonably likely to cause serious injury. The "reasonably likely to cause serious injury" inquiry is a part of the deadly-force determination in all other circuits that have defined "deadly force." We have, wisely or not, rejected the test all others employ. *See* n.15, *supra*. In any event, in the case before us, the question is not whether the force was "deadly." The evidence in the record before us makes it clear that, "deadly" or not, the force used by Rutherford is capable of causing serious injury to the

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[22] Rutherford does not remember giving a warning; nor do any of the other eleven witnesses mention his doing so when describing the events they saw or heard. At oral argument, appellee's counsel claimed that it was Rutherford's usual practice to give a warning, where possible, before shooting. While Rutherford's testimony to that effect would not have changed our analysis, there is no evidence in the record before us that supports counsel's claim, and certainly no foundational evidence, such as how many times Rutherford had shot people in the past. At most, Rutherford may have shouted "less-lethal." Officer Estes claims to have heard Rutherford shout "less lethal" before firing. Officer Smith claims Rutherford shouted "less-lethal," but cannot remember whether it was before or after the shot was fired. It is just as likely that both officers heard Lt. Nichols who admitted that he shouted "less than lethal" after Rutherford fired the cloth-cased shot "so other officers would know what had occurred." That cryptic statement was insufficient to alert a target that force would be deployed, let alone that he would be shot, particularly as the purpose of the announcement was, as Lt. Nichols indicated, otherwise.

person shot, and that such injury may occur in any given instance.[23] Less than deadly force, like deadly force, may not be used without sufficient reason; rather, it is subject to the *Graham* balancing test. *Chew*, 27 F.3d at 1442. Less than deadly force that may lead to serious injury may be used only when a strong governmental interest warrants its use, and in such circumstances should be preceded by a warning, when feasible. *Id.* at 1442-1433. Under the fourth-amendment objective-reasonableness standard, the shooting violated Deorle's right to be free from unreasonable seizures. *See Graham*, 490 U.S. at 396 (applying *Garner*, 471 U.S. at 8-9). We now consider whether Rutherford is protected by the defense of qualified immunity.

II. Qualified Immunity

[12] Rutherford, who was sued in his individual capacity for violating § 1983, has raised the affirmative defense of qualified immunity. The doctrine of qualified immunity insulates government agents against personal liability for money damages for actions taken in good faith pursuant to their discretionary authority. *See Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). More specifically, "governmental officials . . . generally are shielded from liability for civil damages insofar as their conduct as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818.

[13] Here, the test is not simply a reiteration of the *Graham* test which we applied, above: rather, we must determine whether, in using excessive force, the officer made a "reasonable mistake[ ] as to the legality of [his] actions." *Katz*, 121 S. Ct. at 2158. We assume, *arguendo*, that Rutherford thought that the force he used was not excessive; however, that is not the issue. Rather, the question is whether Rutherford's use of force was premised on a *reasonable* belief that such force was lawful, or, as the Supreme Court recently put it: "whether it would be clear to a reasonable officer that his conduct was

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[23] To examine the prospects of serious injury, as does the dissent, on the basis of the assumption that a shot from a shotgun will hit the precise part of the body at which it is aimed by the shooter, is not only unsupported by the record, but contrary to the experience and training of law enforcement agencies. It is hardly unusual for bullets or lead-filled beanbags fired from shotguns to be off the mark.

unlawful in the situation he confronted." *Id.* at 2156. The Court also explained the purpose of the rule: "[q]ualified immunity operates . . . to protect officers from the sometimes hazy border between excessive and acceptable force." *Id.* at 2158. It helps, therefore, to begin our discussion with the observation that, on the basis of the facts we have discussed, this is by no means a borderline case. It should have been clear to any reasonable officer that, under the circumstances present, firing at Deorle was objectively unreasonable.

Every police officer should know that it is objectively unreasonable to shoot – even with lead shot wrapped in a cloth case – an unarmed man who: has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals. Here, all those factors were present. Deorle had complied with the police officers' instructions, had discarded his potential weapons whenever asked to do so, and has not assaulted anyone; in addition, a team of negotiators essential to resolving such situations was en route.

[14] Although there is no prior case prohibiting the use of this specific type of force in precisely the circumstances here involved, that is insufficient to entitle Rutherford to qualified immunity: notwithstanding the absence of direct precedent, the law may be, as it was here, clearly established. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (rejecting the notion that officer liability cannot exist "unless the very action in question has previously been held unlawful"). Otherwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct. When " 'the defendant['s] conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts' that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established." *Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir. 1994) (quoting *Castell v. Pieschek*, 3 F.3d 1050, 1053 (7th Cir. 1993)). This is such a case. No reasonable officer could have believed that Rutherford's action in shooting Deorle with the "less lethal" lead-filled beanbag round was appropriate or lawful. To the contrary, "it would

be clear to a reasonable officer that [Rutherford's] conduct was unlawful. *Katz*, 121 S.Ct. at 2158. It does not matter that no case of this court directly addresses the use of such weapons; we have held that "[a]n officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury." *Mendoza*, 27 F.3d at 1362. Given all the circumstances, the error in judgment, such as it was, does not constitute a "reasonable mistake" of fact or law on Rutherford's part. Viewing the facts in the light most favorable to the plaintiff, Rutherford was not entitled to qualified immunity for his use of excessive force.

CONCLUSION

Viewing the facts in the light we must, we conclude that, for purposes of summary judgment:

> Rutherford's use of force was excessive and the defense of qualified immunity is unavailing. The degree of force was plainly in excess of the governmental interest at stake. The law was clear that Rutherford's shooting Deorle was in violation of Deorle's constitutional rights, and there was no reasonable basis for any factual or legal misperception on Rutherford's part: no reasonable officer could have concluded that the force employed was appropriate or lawful.

Accordingly, we reverse the grant of summary judgment and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

SILVERMAN, Circuit Judge, dissenting:

The essential facts are not disputed. Plaintiff Richard Deorle was deranged and out of control when Deorle's wife made her 911 call to the police. When Deorle saw his wife on the telephone calling for help, he told her that they would have to come kill him.

After the first deputy sheriff (Mahon) arrived at the scene,

Deorle was observed holding a two-by-six board with nails protruding from the end of it. According to Mrs. Deorle's taped-recorded statement on the day in question, Deorle "was so angry, that he just started lifting up the porch, you know the board, it has a railing and he lifted up the railing and he was like swinging it" like a baseball bat. At her deposition held three years later, Mrs. Deorle stated that he was "screaming" but not swinging the board around. Either way, the undisputed fact is that Deorle, while screaming and on a rampage, was in possession of a board with protruding nails, and that he finally dropped it when Mahon took his pistol out of his holster.

Mahon was able to get Deorle's wife and children safely into his patrol car. Mrs. Deorle told Mahon that Deorle was depressed, that he had been drinking, that he was in a rage caused by his medication, that he previously had been arrested for assaulting her in a domestic incident, and that he had been on probation.

It is undisputed that after dropping the board, Deorle picked up two hatchets and a crossbow. According to Mrs. Deorle, the crossbow was of the type used for recreational target shooting, not hunting, and that "it does look serious." In her tape-recorded interview, she recalled that when the police on the scene asked her whether her husband had any weapons, she told them, "No, except he has a crossbow."[1]

Lt. Estes heard Deorle say that he wanted to die and that he would kill anyone who came on his property. It was around this time that Deputy Rutherford arrived on the scene and was briefed on all of the above. Deorle dropped the hatchets, but continued to hold the crossbow in his right hand. In his left hand he was carrying a can of lighter fluid. He dropped the crossbow, advanced toward Rutherford and then said something to the effect of, "I'm going to kick your ass, mother-fucker."

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[1] It is unclear whether the crossbow was loaded. However, two days after the incident, when asked in a recorded interview about whether the crossbow as loaded, Deorle replied, "Yeah, but shit, it wouldn't even put a hole in that wall right here." He also stated that the crossbow fired a "little arrow" that "basically" had a standard point like on a normal arrow. There is nothing in the record to suggest that the crossbow was a child's toy or looked like one.

It is undisputed that Rutherford was trained in the proper use of the so-called beanbag round, which was designed to knockdown and incapacitate a person so that an arrest can be effected. The majority is right; it is not a toy, but it is not designed to kill or injury. To the contrary, it is designed to prevent serious injury. Although virtually anything can cause death or serious injury under the right circumstances and the beanbag round is no exception, *see Vera Cruz v. City of Escondido*, 139 F.3d 659 (9th Cir. 1998), the undisputed evidence established that the firing of a beanbag round from a 12-gauge shotgun at a person's "center mass" from a distance of 20 to 40 feet is not reasonably likely to cause death or serious injury. Furthermore, the evidence is uncontradicted that the beanbag round was fired at Deorle's lower right abdomen but that it suddenly "flew up" and unexpectedly and unintentionally hit Deorle in the face.[2]

Under *Saucier v. Katz*, 121 S. Ct. 2151 (2001), the first issue is whether, taken in the light most favorable to Deorle, the facts show that a constitutional right was violated. The undisputed facts show that it was not. Deorle may have been sick, he may have been deranged, but that did not make him any less dangerous to the officers who responded to Mrs. Deorle's call for help. Deorle advanced toward Rutherford, threatening to harm him, while brandishing a quart can of lighter fluid. Rutherford had no duty to wait to be doused with a flammable liquid or to be set ablaze before acting to protect himself. The majority's insistence of portraying Deorle as unarmed is simply incorrect. He was armed with a container of lighter fluid and was advancing toward Rutherford while threatening to kick his ass. Rutherford may not have had the right to use deadly force at that point, but he had every right to protect himself with a degree of force likely only to temporarily incapacitate. That is what he did.

True, Rutherford did not issue a warning before firing the beanbag round at the advancing Deorle, but there is no telling, even in hindsight, what Deorle might have done had a warning been issued. Only a short time earlier, Deorle told his wife that he wanted to die and that if the police came on his property they would have to kill him –

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[2] It is interesting to note that the declaration of retired Sacramento Police Department Sgt. Peter A. Reedy, which is referred to twice in the majority opinion, contains not one word indicating that Sgt. Reedy has any experience, training or expertise with beanbag rounds.

and Rutherford knew that. Deorle might have surrendered, but he also might have attempted to set Rutherford on fire or engage in self-immolation. Deorle also might have kept on coming, and if he got closer than 20 feet away, the beanbag round could not have been sued. Then hand-to-hand combat would have been inevitable, which is not without its own serious, sometimes life-threatening, risks to suspects and officers alike. Under the circumstances, it was not objectively unreasonable for Rutherford to attempt to safely and preemptively subdue him as he did. *See Graham v. Connor*, 490 U.S. 386 (1989). As the Court said in *Saucier*, "If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed." 121 S. Ct. at 2158. Under *Saucier*, that should end the inquiry.

But even if Rutherford were mistaken about whether the amount of force he used was legal in the circumstances, the issue under the second part of the *Saucier* sequential analysis becomes whether the officer's *mistake* was reasonable. *Id.* "An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense." *Id.* This turns on whether the officer's conduct violated a "clearly established rule." *Id.* at 2160.

The facts outlined above demonstrate that Rutherford's response to Deorle's threatening actions, even if excessive, even if mistaken, was not an unreasonable mistake. It did not violate any clearly established rule. It is undisputed that he deployed a degree of force that he was trained to use and that he reasonably believed would subdue the advancing and threatening Deorle without doing any significant harm. Neither Deorle nor the majority, as required by the Supreme Court, "has identified any case demonstrating a clearly established rule prohibiting the officer from acting as he did." *Id.* The majority admits that "there is no prior case prohibiting the use of this specific type of force in precisely the circumstances here involved." Majority Op. at 11976. In fact, the best the majority can come up with is cases involving the use of pain compliance techniques, not in self-defense, but to disperse nonviolent protestors (*Forrester v. City of San Diego*, 25 F.3d 804 (9th Cir. 1994); *Headwaters Forest Def. v. County of Humbolt*, 240 F.3d 1185

(9th Cir. 2000)). Likewise, *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1366 (9th Cir. 1994) concerns the circumstances under which the police may storm a house, not self-defense. Neither *Brewer v. City of Napa*, 210 F.3d 1093 (9th Cir. 2000) nor *Headwaters Forest* held that warnings are required before deploying force. But even if they did, which they don't, they were decided four years *after* Rutherford's encounter with Deorle.

Because I believe that Rutherford was entitled to qualified immunity, I would affirm the granting of summary judgment in his favor and in favor of the Sheriff of Butte County. Accordingly, I respectfully dissent.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Richard Leo Deorle,
Plaintiff-Appellant,

v.

Greg Rutherford, Butte County Deputy Sheriff; Mick Grey, Butte County Sheriff; County of Butte,
Defendants-Appellees.
_____/

No. 99-17188

D.C. No.
CV-97-434-LKK

AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Argued and Submitted
December 12, 2000 – San Francisco, California

Filed March 16, 2001
Amended Opinion Filed August 31, 2001

Before: Myron Bright,* Stephen Reinhardt, and
Barry G. Silverman, Circuit Judges.

Opinion by Judge Reinhardt;
Dissent by Judge Silverman

*The Honorable Myron Bright, Senior United States Circuit Judge for the Eight Circuit, sitting by designation.

OPINION

REINHARDT, Circuit Judge:

Police Officer Greg Rutherford fired a "less lethal" lead-filled "beanbag round" into the face of Richard Leo Deorle, an emotionally disturbed resident of Butte County, California, who was walking at a "steady gait" in his direction. He did so although Deorle was unarmed, had not attacked or even touched anyone, had generally obeyed the instructions given him by various police officers, and had not committed any serious offense. Rutherford did not warn Deorle that he would be shot if he physically crossed an undisclosed line or order him to halt. Rutherford simply fired at Deorle when he arrived at a spot Rutherford had predetermined. The projectile Rutherford fired removed Deorle's eye and left lead shot implanted in his skull. We are presented on appeal with two questions: whether the force used was excessive; and, if so, whether Officer Rutherford is nevertheless entitled to qualified immunity because the law was not clearly established or because the officer made an objectively reasonable error in judgment. Both inquiries are a part of the qualified immunity issue on which the district court granted Rutherford summary judgment.

BACKGROUND[1]

On September 9, 1996, in Butte County, California, Richard Deorle (Deorle), upset at being diagnosed with Hepatitis C, and having consumed a half-pint of vodka and some Interferon, his prescribed medication, began behaving erratically. By four o'clock, Deorle had become suicidal. According to Mrs. Deorle, having "lost control of himself," Deorle began screaming and banging on the walls of their house. In search of someone to help her with her distressed husband,

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[1] When we review an order granting summary judgment to the defendant, we must view the relevant facts in the light most favorable to the plaintiff. *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998). That standard also applies to our determination of the defendants' entitlement to qualified immunity as a matter of law. *See Moran v. Washington*, 147 F.3d 839, 844 (9th Cir.1998)

Mrs. Deorle dialed 911.[2]

Her call was answered by the police, who dispatched Officer Mahon to the Deorle residence. Mrs. Deorle, accompanied by their children, left the house. Deorle did not hinder their departure. He did, however, rather angrily, refuse to let Mahon enter the house without a warrant. Mahon escorted Deorle's family one block from their house, radioed for "Code 3 Backup," and requested that more officers be sent quickly.

At least 13 officers responded to Mahon's request for "backup."[3] These officers set up roadblocks on the streets around the house to ensure that Deorle had no avenue of escape,[4] and awaited the arrival of a Special Incident Response Team ("SIRT") and a team of negotiators. SIRT members are trained to "arrest . . . suspects in the most efficient and least hazardous manner . . . [and] arrest suspect[s] with a minimum amount of risk or danger to the . . . suspect." Negotiators are "[d]eputies trained in the specialized area of crisis negotiations. . . . Their role as negotiator is essential to the successful resolution of critical incidents as it relates to conflict resolution."[5]

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[2] Mrs. Deorle testified that, when she dialed 911, Deorle was "just screaming. I don't remember any words, just screaming like in pain." She picked up the phone intending to get medical help, dialed 911, and left the phone on the dresser.

[3] Rutherford, claims there were between five and ten police officers at Deorle's residence. Appellees' evidence in support of their summary judgment motion suggests that at least thirteen officers were at the scene when Deorle was shot, and a police log indicates that as many as 24 officers may have been present before or immediately after the shooting.

[4] According to the affidavit testimony of various police witnesses, the police secured the area along Creston Road in front of Deorle's house by establishing two roadblocks, one at the intersection of Creston and Sherwood, where Officers Mahon, Muldown, and Collins were stationed, and one at the intersection of Creston and Skyway, staffed by at least two officers, including Officer Hard, but possibly also Sergeant Estes and Officer Johnson. Various officers observed Deorle, who walked up and down Creston Road from one police roadblock to the other and periodically returned to his property or his house.

[5] Butte County Sheriff's Department Special Incident Response Team Tactical Manual at 9, 2.

Deorle, though verbally , was physically compliant and generally followed all the officers' instructions. When a canine team "tested" his behavior by making their dog bark aggressively at Deorle, he retreated towards his house. When a wooden board from the porch railings came away in his hands, Deorle dropped it at the officers' command. Although shouting "kill me" and brandishing a hatchet at a police officer, he threw the hatchet away into a clump of trees when told to put it down. Still, Deorle remained agitated and continued to roam on or about the property but well within the police roadblocks. Officer Rutherford, who was at the scene for thirty to forty minutes, did not observe Deorle touch, let alone attack, anyone; nor had he received any report of any such action on Deorle's part. He did, however, hear Deorle scream at him that he would "kick his ass."

Rutherford was a member of the SIRT team. He was trained in the deployment of force against recalcitrant suspects and had arrived on the scene in response to Mahon's Code 3 call. After a briefing by his superiors and consultation with another officer on the scene, he decided to reconnoiter closer to Deorle, although the negotiators assigned to handle the incident had not yet arrived. Accompanied by officers Estes and Nichols, Rutherford observed Deorle for about five to ten minutes from the cover of some trees before Deorle, carrying an unloaded plastic crossbow in one hand[6] and what may have been a can or a bottle of lighter fluid in the other,[7] started shouting at the officers. Rutherford was armed with a twelve-gauge shotgun loaded with what appellees

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[6] The dissent says that it is unclear whether the crossbow was loaded. If it were unclear, we would be required to assume for purposes of summary judgment that it was not loaded. Here, however, Rutherford, himself, acknowledged that the crossbow was unloaded when he observed Deorle. *See* Transcript of Deposition of Greg Rutherford, dated July 29, 1998 at 60:25-26.

[7] In his deposition, Rutherford testified at various times that he observed a plastic bottle in Deorle's hand, but stated equally unequivocally at other points that it was a can that he observed. He also stated that it was lighter fluid that Deorle was carrying because he could tell that from the type of container in Deorle's hand. Indeed, in his deposition, Rutherford said that he could distinguish what type of lighter fluid it was – charcoal lighter fluid rather than that used to fill cigarette lighters – because of its container (apparently, whether that container was a can or a plastic bottle). We also note that Rutherfford observed the can or bottle at a distance of more than thirty feet.

term a "less-lethal" or "beanbag" round. These rounds are made of lead shot contained in a cloth sack, and are small enough to be fired from a shotgun.[8] The rounds "could have lethal capabilities" at thirty feet, and are potentially lethal at up to fifty feet.[9]

In response to Deorle's taunts, Rutherford shouted at him to put down the crossbow and Deorle "discarded" it.[10] According to Rutherford, Deorle:

> walk[ed] directly at me at a steady gate [sic]. . . . He didn't run at me, he didn't take his time getting to me, it was just a steady walk directly at me. . . .Once he started walking towards me I took a little wider stance with my feet to get a good stable base. As I leaned my weapon up against the tree to make it more stable and I focused on his lower right rib area as he was walking towards me for a target area.[11]

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[8] The shot is enveloped in cloth to prevent its spreading and peppering the target. The shot, thus encased, is expelled from a twelve-gauge shotgun at a speed of between 280 and 300 feet per second, and delivers a force sufficient to knock someone off his feet and render him incapable of resistance.

[9] Transcript of Deposition of Greg Rutherford, dated July 29, 1998, at 99:23-24.

[10] Nowhere in the record is there any mention of any other instruction or order given by Rutherford, or any suggestion that Rutherford told him to drop the bottle or can.

[11] In a statement given to Sergeant Nickelson of the Oroville Police Department on the day in question, Rutherford stated that just prior to shooting Deorle he observed him at a distance of forty feet. Deorle was returning to the grounds of his house from the Sherwood roadblock situated to the west of the house. Rutherford had positioned himself behind a tree in a garden on the east side of the house, between Deorle's property and the Skyway roadblock. According to Sgt. Nickelson, Rutherford told him that he was concerned about "a hostage possibility." "He [Rutherford] said that he was not going to retreat, he knew that he was in a good, secure position. . . . He could not tell if the crossbow was loaded . . . Deputy Rutherford said he already believed that less than lethal rounds would be reasonable use of force in this situation. . . . Deputy Rutherford observed the suspect throw the cross bow to the ground . . . [T]he suspect kept coming closer to him and when the suspect went passed [sic] a similar sized tree, approximately 30 feet away from him, he decided that the subject

Rutherford had stationed himself in a garden adjacent to Deorle's house and on its east side. He waited until Deorle, who was walking in an easterly direction on his own property, reached a predetermined point, then fired. He did not warn Deorle that he was going to shoot him. He did not ask him to drop the bottle or can. Nor did he order him to halt. The cloth-cased shot struck Deorle in the face, knocked him off his feet, and lodged "half out of his eye." Deorle suffered multiple fractures to his cranium, loss of his left eye, and lead shot embedded in his skull. A team of negotiators was still en route at the time Rutherford shot Deorle.

Deorle sued Rutherford, Mick Grey (the Butte County Sheriff), the County of Butte, and Defense Technology Corporation (the manufacturer of the cloth-cased shot), for, among other things, excessive force in violation of the fourth amendment. Rutherford and Grey asserted qualified immunity and moved for summary judgment. The district court held that Rutherford was entitled to qualified immunity, that he did not violate Deorle's right to be free from excessive force, and that there was therefore no basis for holding the other defendants liable. The court granted summary judgment for defendants and denied Deorle's motion for reconsideration. This appeal followed.[12]

STANDARD OF REVIEW

A court reviews de novo the district court's determination regarding qualified immunity. *See Robinson v. Prunty*, 249 F.3d 862, 865-866 (9th Cir. 2001). A district court's decision to grant summary

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had approached and was in an uncomfortable position for him. Deputy Rutherford felt he was in jeopardy and if he passed the tree, that he would shoot the subject. Deputy Rutherford said the weapon had already been aimed at the suspect when he noticed him approaching with the cross bow. He said that when the subject got passed [sic] the tree, he shot the round at the subject." Although, after discarding the crossbow, Deorle still possessed a bottle or a can, it appears from Nickelson's report that Rutherford was unable to determine the nature of the container's contents at the time he shot Deorle, and that (be it a bottle or a can) Deorle's possession of the item did not constitute a factor, let alone a significant one, in Rutherford's decision to shoot.

[12] The excessive-force claim against Officer Rutherford, which reaches us in the form of a challenge to the court's qualified immunity ruling, is the only issue on appeal.

judgment is also reviewed de novo. *See Crow Tribe of Indians v. Raciot*, 87 F.3d 1039, 1043 (9th Cir. 1996).

DISCUSSION

[1] The Supreme Court has recently determined the manner in which courts are to proceed when, in an excessive force case brought under 42 U.S.C. § 1983, government officials assert the defense of qualified immunity. *See Saucier v. Katz*, ___ U.S. ___, 121 S. Ct. 2151 (2001). A court must "consider[ ] in proper sequence" the "requisites of a qualified immunity defense." *Id.* at 2155. First the court must determine, as a "threshold question," whether the plaintiff has shown the deprivation of a constitutional right. *Id.* at 2156. *See also Wilson v. Layne*, 526 U.S. 603, 609 (1999). If so, the court must then determine whether the right violated was clearly established in a "particularized . . . sense: . . . the relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Katz*, 121 S. Ct. at 2156. Accordingly, we first examine whether the force used to subdue Deorle was excessive as a matter of law.

I. Excessive Force

[2] We examine the use of force to effect an arrest in light of the Fourth Amendment's prohibition on unreasonable seizures. *Graham v. Connor*, 490 U.S. 386 (1989); *Chew v. Gates*, 27 F.3d 1432, 1440 (1994). The officer's actions are measured by the standard of objective reasonableness, *Graham*, 490 U.S. at 397. The reasonableness of the force used to effect a particular seizure, is determined by "careful[ly] balancing . . . 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' at stake." *Graham*, 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). As we have held, "[t]he force which [i]s applied must be balanced against the need for that force." *Liston v. County of Riverside*, 120 F.3d 965, 976 (1977). *See also Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367 (9th Cir. 1994).

A. Nature and Quality of Intrusion

We first assess the quantum of force used to arrest Deorle by

considering "the type and amount of force inflicted." *Headwaters Forest Def. v. County of Humbolt*, 240 F.3d 1185, 1198 (9th Cir. 2000)(internal quotation marks omitted)(quoting *Chew*, 27 F.3d at 1440). In the instant case, Rutherford shot Deorle using a lead-filled, "less-lethal" round.[13] This cloth-cased shot, which is something akin to a rubber bullet, is defined as a "long-range impact weapon."[14] It is fired from a 12-gauge shotgun, and calculated to stop "people who are violent or hostile and are threatening injury or death to themselves or others." By Rutherford's own admission, the cloth-cased shot was potentially lethal at thirty feet and could be lethal at distances up to fifty feet. Also by Rutherford's own admission, "[t]he target area for lethal capabilities would probably be the facial area. . . . If it impacted at the heart it could stop the heart or possibly tear a vital artery." Rutherford shot at Deorle's torso from thirty feet: the round hit Deorle in the head and removed his left eye and lodged pieces of lead shot in his skull.

The force used was obviously enough to cause grave physical injury. It knocked Deorle off his feet, and removed one of his eyes. The force applied through use of the cloth-case shot can kill a person if it strikes his head or the left side of his chest at a range of under fifty feet. Such force is much greater than that applied through the use of pepper spray, *see Headwaters Forest*, 240 F.3d at 1203, or a painful compliance hold, *see Forrester v. City of San Diego*, 25 F.3d 804, 806 (9th Cir. 1994)(police force's "pain compliance unit" dispersed demonstrators using "Orcutt Police Nonchakus" – two sticks of wood connected at one end by a cord – or using wrist-and arm-twisting and pressure point holds), and more likely to cause a life-threatening injury than most dog bites. *See Vera Cruz v. City of Escondido*, 139 F.3d 659, 663 (9th Cir. 1997).

[3] However, the cloth-cased shot falls short of deadly force as

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[13] The appellees also call the cloth-cased shot a "beanbag" round. That euphemism grossly underrates the dangerousness of this projectile. The round is not some sort of "hackey-sack." It is a projectile capable of inflicting serious injury or death, rather than some children's toy.

[14] *See* the affidavit of Peter A. Reedy, a Sergeant with the Sacramento Department Force for 20 years, dated March 16, 1999, and filed in support of Deorle's opposition to defendants' motion for summary judgment.

defined in this circuit: "that force which is reasonably likely to cause *death*." *Vera Cruz*, 139 F.3d at 663 (emphasis added).[15] The shot is not like a regular bullet – it does not normally rip through soft tissue and bone on contact with the human body. It is designed to knock down a target, rendering the individual incapable of resistance, without (in the normal course of deployment) resulting in death. Nonetheless, the cloth-cased shot constitutes force which has the capability of causing serious injury, and in some instances does so.[16] According to the affidavit of Sergeant Reedy, "[t]he Use of Force Continuum, as used in California, would list an impact weapon high on the schedule of force."[17] Such force, though less than deadly, is not to be deployed lightly. To put it in terms of the test we apply: the degree of force used by Rutherford is permissible only when a strong governmental interest compels the employment of such force.

B. Governmental Interests at Stake

[4] We measure the governmental interests at stake by evaluating a range of factors: they include " '(1) the severity of the crime at issue, (2) whether the suspect pose[d] an immediate threat to the safety of the officers or others . . . (3) whether he [was] actively resisting arrest or attempting to evade arrest by flight,' and any other 'exigent circumstances [that] existed at the time of the arrest.' " *Headwaters Forest*, 240 F.3d at 1198-99 (quoting *Chew*, 27 F.3d at 1440-1441 & n.5). These factors, however, are simply a means by which to determine objectively "the amount of force that is necessary

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[15] The extremely high deadly-force standard enunciated in *Vera Cruz* is unique to this circuit. *See id.* at 662-663. In other circuits the standard is "a substantial risk of causing death *or serious bodily injury*." *See id.* at 661 (emphasis in original), 663 (citing *Ryder v. City of Topeka*, 814 F.2d 1412, 1416 n.11 (10th Cir. 1987); *Pruitt v. City of Montgomery*, 771 F.2d 1475, 1479 n.10 (11th Cir. 1985); *Robinette v. Barnes*, 854 F.2d 909, 912-913 (6th Cir. 1988)).

[16] *See, e.g., Student Who Lost Eye Was Shot by Police Using "Non-Lethal Weapon*, S. F. Chron., Apr. 10, 2001 at D 6 (The student was simply observing a riot that occurred following the loss of an NCAA final four basketball game by the University of Arizona when an officer shot him with a "beanbag" round).

[17] Sergeant Reedy offered his expert opinion that "[i]t would be unreasonable for an officer to use an impact weapon on an unarmed person."

in a particular situation." *Graham*, 490 U.S. at 396-97.

[5] The character of the offense is often an important consideration in determining whether the use of force was justified. *See Chew*, 27 F.3d at 1442 & n.9; *Headwaters Forest*, 240 F.3d at 1204-1205 (same). In this case, the officers were initially on, or attempting to enter, Deorle's property without a warrant. They arrived, not to arrest him, but to investigate his peculiar behavior. Deorle was clearly a deeply troubled, emotionally disturbed individual. Mrs. Deorle testified that pain, induced by a reaction to his medication, had driven Deorle "out of control. He just didn't want to live any more." Deorle repeatedly asked officers to shoot him. Lt. Estes, reported that Deorle shouted he "[ha]d no reason to live . . . that the pain was unbearable, and that he wanted to be done with the pain, and that there was no use in continuing." Officer Johnson, Rutherford's superior, heard Deorle asking other officers to kill him. Ultimately, Deorle was charged with nothing more than obstructing the police in the performance of their duties. *See* Cal. Pen. Code § 69.

[6] Rutherford observed Deorle at close proximity for about five to ten minutes before shooting. His testimony is that he fired his shotgun as Deorle was walking towards him, at a steady gait, carrying only a bottle or a can in his hand.[18] Rutherford, who was supposed to be reconnoitering and gathering information for the SIRT team to help determine the nature of the response, instead concluded that he occupied a secure position, that he would not retreat from that position, and that he would shoot if Deorle came within a certain range. He steadied himself against a tree, and waited until Deorle reached that point; then, without a command to stop or a warning that force would be employed, pulled the trigger.

[7] A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury. There must be other significant circumstances that warrant the use of such a degree of force at the time it is used. *See Headwaters Forest*, 240 F.3d at 1203 (the fact that the police defendants were increasingly frustrated by the protesters

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[18] Deorle was wearing no shirt or shoes, only a pair of cut-off jeans shorts. There was nowhere for him to secrete any weapons.

– who had developed techniques such as lock-down devices to prolong nonviolent civil protests – is irrelevant under *Graham*). Rutherford testified in his deposition that he shot Deorle to prevent the latter from passing him and thereby posing a menace to Rutherford, the public and other officers.[19] However, a simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern. In short, an officer's use of force must be objectively reasonable based on his contemporaneous knowledge of the facts. Here, as Rutherford knew, Deorle had discarded his crossbow following Rutherford's instructions to do so, and carried only a bottle or a can with him at the time he was shot. A thorough review of the record reveals that the facts are sufficiently unclear as to what Rutherford believed or feared – reasonable or not – that the determination must be made by a trier of fact, and not, as the dissent does, by portraying the facts in the light most favorable to the moving party.

[8] Rutherford's statements must be considered in light of the objective facts and circumstances. Among them are the following: Rutherford had consulted with his senior officers before deciding to reconnoiter. He knew that roadblocks prevented Deorle leaving the area in front of his house – the area in which he was walking back and forth from time to time – and that a number of officers were stationed at each roadblock. During the forty minutes he had spent at the scene, Rutherford had not observed Deorle attack anyone; nor had he received any report that Deorle had engaged in any such conduct. Deorle had roamed about the area and shouted in an irrational manner, but had not harmed or attempted to harm anyone. Nor had he attempted to

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[19] We note that there are certain conflicts between the reasons Rutherford provided to Sergeant Nickelson on the day of the shooting and those that he provided during his deposition. In particular, he initially told Sgt. Nickelson that he believed that Deorle might take a neighbor hostage. Furthermore, he did not identify the can or bottle Deorle was carrying, or its contents, as placing him in any particular danger; rather, he said, the threat came from Deorle's approach to within thirty feet. By the time of his deposition, Rutherford made no mention of a potential hostage situation, instead stating that he was afraid Deorle would approach a police roadblock, staffed by a number of police officers, which separated Deorle from members of the public. In addition, he firmly identified the can or bottle of lighter fluid as the principal source of his anxiety, and he said that "if [Deorle] got passed [sic] me . . . he could harm . . . myself and other officers," as well as neighbors and bystanders.

flee or escape. "[D]eputies trained in . . . crisis negotiations . . . [whose] role is essential to the successful resolution of critical incidents" were on their way. Rutherford was stationed in a secure position behind a tree, his line of retreat was clear, and Officer Nichols was stationed almost immediately behind him. Rutherford could easily have avoided a confrontation, and awaited the arrival of the negotiating team by retreating to his original position behind the roadblock. Nothing in the record before us suggests that Rutherford considered other, less dangerous, methods of stopping Deorle. *See Headwaters Forest*, 240 F.3d at 1204 (holding that, before deploying pepper spray, police "were required to consider '[w]hat other tactics if any were available' to effect the arrest"); *Chew*, 27 F.3d at 1443.[20] Rutherford had not seen any bystanders in the immediate area; as far as he was aware, the only neighbors in the vicinity, along with the other police officers, were safely behind the two roadblocks. In sum, the crime being committed, if any, was minor and the danger to Rutherford and others appears to have been minimal, as was the risk of flight. There was no immediate need to subdue Deorle before the negotiators who were part of the response group could arrive and perform their "essential function"; nor had those in charge made a decision to subject Deorle to the use of physical force rather than await their arrival. Considering all the circumstances, at the time Rutherford fired, the governmental interest in using force capable of causing serious injury was clearly not substantial.

C. Weighing the Conflicting Interests

Whether Rutherford's shooting of Deorle was objectively reasonable requires us to consider whether the degree of force used was necessary, *see Liston*, 120 F.3d at 976, in other words, whether the degree of force used was warranted by the governmental interests at stake. *See Graham*, 490 U.S. at 396. Here, given all the circumstances – the large number of police officers present, the pending arrival of the

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[20] We note, incidentally, that other officers used a police dog to provoke Deorle: a "police tactic that needlessly or unreasonably creates a dangerous situation necessitating an escalation in the use of force," and a course of action this circuit has expressly refused to endorse. *See Cunningham v. Gates*, 229 F.3d 1271, 1291 n.23 (9th Cir. 2000).

negotiators "essential to resolve [such] critical incidents"; the nature of Deorle's conduct (essentially disturbing the peace); Deorle's compliance with the prior commands of the officers; the absence of any physical assault; Deorle's having discarded the crossbow when told to do so and being unarmed at the time he was fired upon – the fact that Deorle was walking on his own property in Rutherford's direction with a can or bottle in his hand is insufficient by any objective measure to justify the force deployed. Our conclusion is strongly supported by Rutherford's failure to give Deorle any warning that he would be shot if he approached any closer, or any order to drop the can or bottle or stop where he was: Deorle certainly could not have been expected to comply with instructions that were never given to him.

[9] The problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense. In the former instance, increasing the use of force may, in some circumstances at least, exacerbate the situation; in the latter, a heightened use of less-than-lethal force will usually be helpful in bringing a dangerous situation to a swift end. In the case of mentally unbalanced persons, the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis. *See Alexander*, 29 F.3d at 1366 (holding that the police used excessive force, considering all the circumstances, in "storm[ing] the house of a man whom they knew to be a mentally ill . . . recluse who had threatened to shoot anybody who entered").[21] Even when an emotionally disturbed individual is "acting out" and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime

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[21] In fact, we suggested that the plaintiff could properly argue at trial "that if the police had halted their activities and then gotten an arrest warrant, this too might have avoided the final tragic confrontation. Given the delay attendant in obtaining the warrant, the police might well have sent the gathered city officials away, and then, without the pressure of their presence, and without the expectation that an inspection could be conducted any time soon, might have allowed events to unfold more slowly." *Id.* at 1365. In other words, we suggested that the waiting period was likely to diffuse a potentially violent situation and prevent loss of life, rather than the contrary.

against others, but with a mentally ill individual. We do not adopt a per se rule establishing two different classifications of suspects: mentally disabled persons and serious criminals. Instead, we emphasize that where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed.

We also recognize that police officers' decisions about the appropriate amount of force to use in a given circumstance "are often . . . "split-second judgments [made] in circumstances that are tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 396-97; *see also Washington v. Lambert*, 98 F.3d 1181, 1186 (9th Cir. 1996). However, the situation here was far from that of a lone police officer suddenly confronted by a dangerous armed felon threatening immediate violence: Deorle was eventually charged only with the relatively minor crime of obstructing the police in their effort to subdue him. Rutherford and a host of other officers were at the scene for over half an hour before Rutherford shot the emotionally disturbed Deorle. Rutherford had had an opportunity to observe Deorle for a considerable period of time prior to firing at him. He also had the opportunity to consult with his superiors concerning the tactics to be employed. *Compare Chew*, 27 F.3d at 1142. Moreover, Rutherford possessed a clear line of escape from the position he assumed and a police roadblock or buffer zone had been established behind him. Rutherford and the other officers were awaiting the arrival of skilled negotiators, trained to persuade individuals like Deorle to submit peacefully. The negotiating team had left the station and was on its way to the scene. Nevertheless, Rutherford contemplated shooting Deorle with the "less lethal" round during the entire time Deorle was walking in his direction from the roadblock. In sum, with knowledge of all the relevant circumstances, Rutherford made a calculated and deliberate decision to shoot Deorle when Deorle reached a particular point in his peregrinations: and that is precisely what he did.

[10] The absence of a warning or an order to halt is also a factor that influences our decision. Shooting a person who is making a disturbance because he walks in the direction of an officer at a steady gait with a can or bottle in his hand is clearly not objectively reasonable. Certainly it is not objectively reasonable to do so when the

officer neither orders the individual to stop nor to drop the can or bottle, and does not even warn him that he will be fired upon if he fails to halt. Appropriate warnings comport with actual police practice. Our cases demonstrate that officers provide warnings, where feasible, even when the force used is less than deadly. *See Brewer v. City of Napa*, 210 F.3d 1093, 1094-1095 (9th Cir. 2000)(police officer gave warning before setting dog on suspect); *Vera Cruz*, 139 F.3d at 660 (same); *Headwaters Forest*, 240 F.3d at 1193-94 (police warned protesters before use of pepper spray). We do not hold, however, that warnings are required whenever less than deadly force is employed. Rather, we simply determine that such warnings should be given, when feasible, if the use of force may result in serious injury, and that the giving of a warning or the failure to do so is a factor to be considered in applying the *Graham* balancing test. In the present case, the desirability and feasibility of a warning are obvious. Deorle might never have passed the unannounced, pre-determined spot selected by Rutherford had Rutherford given him a warning or a command to halt. There was ample time to give that order or warning and no reason whatsoever not to do so.[22]

[11] Viewing the facts presented by the record in the light we must, we conclude that even though Rutherford used force that is classified in this circuit as less than deadly, and that would have been so classified in other circuits as well, the force was excessive compared to the governmental interests at stake. The dissent insists that the undisputed fact is that the force used against Deorle is not reasonably

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[22] Rutherford does not remember giving a warning; nor do any of the other eleven witnesses mention his doing so when describing the events they saw or heard. At oral argument, appellee's counsel claimed that it was Rutherford's usual practice to give a warning, where possible, before shooting. While Rutherford's testimony to that effect would not have changed our analysis, there is no evidence in the record before us that supports counsel's claim, and certainly no foundational evidence, such as how many times Rutherford had shot people in the past. At most, Rutherford may have shouted "less-lethal." Officer Estes claims to have heard Rutherford shout "less-lethal" before firing. Officer Smith claims Rutherford shouted "less-lethal," but cannot remember whether it was before or after the shot was fired. It is just as likely that both officers heard Lt. Nichols who admitted that he shouted "less than lethal" after Rutherford fired the cloth-cased shot "so other officers would know what had occurred." That cryptic statement was insufficient to alert a target that force would be deployed, let alone that he would be shot, particularly as the purpose of the announcement was, as Lt. Nichols indicated, otherwise.

likely to cause serious injury. The "reasonably likely to cause serious injury" inquiry is a part of the deadly-force determination in all other circuits that have defined "deadly force." We have, wisely or not, rejected the test all others employ. *See* n.15, *supra*. In any event, in the case before us, the question is not whether the force was "deadly." The evidence in the record before us makes it clear that, "deadly" or not, the force used by Rutherford is capable of causing serious injury to the person shot, and that such injury may occur in any given instance.[23] Less than deadly force, like deadly force, may not be used without sufficient reason; rather, it is subject to the *Graham* balancing test. *Chew*, 27 F.3d at 1442. Less than deadly force that may lead to serious injury may be used only when a strong governmental interest warrants its use, and in such circumstances should be preceded by a warning, when feasible. *Id.* at 1442-1433. Under the fourth-amendment objective-reasonableness standard, the shooting violated Deorle's right to be free from unreasonable seizures. *See Graham*, 490 U.S. at 396 (applying *Garner*, 471 U.S. at 8-9). We now consider whether Rutherford is protected by the defense of qualified immunity.

II. Qualified Immunity

[12] Rutherford, who was sued in his individual capacity for violating § 1983, has raised the affirmative defense of qualified immunity. The doctrine of qualified immunity insulates government agents against personal liability for money damages for actions taken in good faith pursuant to their discretionary authority. *See Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). More specifically, "governmental officials . . . generally are shielded from liability for civil damages insofar as their conduct as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818.

[13] Here, the test is not simply a reiteration of the *Graham* test which we applied, above: rather, we must determine whether, in using

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[23] To examine the prospects of serious injury, as does the dissent, on the basis of the assumption that a shot from a shotgun will hit the precise part of the body at which it is aimed by the shooter, is not only unsupported by the record, but contrary to the experience and training of law enforcement agencies. It is hardly unusual for bullets or lead-filled beanbags fired from shotguns to be off the mark.

excessive force, the officer made a "reasonable mistake[ ] as to the legality of [his] actions." *Katz*, 121 S. Ct. at 2158. We assume, *arguendo*, that Rutherford thought that the force he used was not excessive; however, that is not the issue. Rather, the question is whether Rutherford's use of force was premised on a *reasonable* belief that such force was lawful, or, as the Supreme Court recently put it: "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 2156. The Court also explained the purpose of the rule: "[q]ualified immunity operates . . . to protect officers from the sometimes hazy border between excessive and acceptable force." *Id.* at 2158. It helps, therefore, to begin our discussion with the observation that, on the basis of the facts we have discussed, this is by no means a borderline case. It should have been clear to any reasonable officer that, under the circumstances present, firing at Deorle was objectively unreasonable.

Every police officer should know that it is objectively unreasonable to shoot – even with lead shot wrapped in a cloth case – an unarmed man who: has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals. Here, all those factors were present. Deorle had complied with the police officers' instructions, had discarded his potential weapons whenever asked to do so, and has not assaulted anyone; in addition, a team of negotiators essential to resolving such situations was en route.

[14] Although there is no prior case prohibiting the use of this specific type of force in precisely the circumstances here involved, that is insufficient to entitle Rutherford to qualified immunity: notwithstanding the absence of direct precedent, the law may be, as it was here, clearly established. *See DeBoer v. Pennington*, 206 F.3d 857, 864-865 (9th Cir. 2000). Otherwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct. When "the defendant['s] conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous pre-existing case law is not required

to show that the law is clearly established." *DeBoer*, 206 F.3d at 864-865. This is such a case. No reasonable officer could have believed that Rutherford's action in shooting Deorle with the "less lethal" lead-filled beanbag round was appropriate or lawful. To the contrary, "it would be clear to a reasonable officer that [Rutherford's] conduct was unlawful." *Katz*, 121 S. Ct. at 2158. Given all the circumstances, the error in judgment, such as it was, does not constitute a "reasonable mistake" of fact or law on Rutherford's part. Viewing the facts in the light most favorable to the plaintiff, Rutherford was not entitled to qualified immunity for his use of excessive force.

CONCLUSION

Viewing the facts in the light we must, we conclude that, for purposes of summary judgment:

> Rutherford's use of force was excessive and the defense of qualified immunity is unavailing. The degree of force was plainly in excess of the governmental interest at stake. The law was clear that Rutherford's shooting Deorle was in violation of Deorle's constitutional rights, and there was no reasonable basis for any factual or legal misperception on Rutherford's part: no reasonable officer could have concluded that the force employed was appropriate or lawful.

Accordingly, we reverse the grant of summary judgment and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

SILVERMAN, Circuit Judge, dissenting:

The essential facts are not disputed. Plaintiff Richard Deorle was deranged and out of control when Deorle's wife made her 911 call to the police. When Deorle saw his wife on the telephone calling for help, he told her that they would have to come kill him.

After the first deputy sheriff (Mahon) arrived at the scene,

Deorle was observed holding a two-by-six board with nails protruding from the end of it. According to Mrs. Deorle's taped-recorded statement on the day in question, Deorle "was so angry, that he just started lifting up the porch, you know the board, it has a railing and he lifted up the railing and he was like swinging it" like a baseball bat. At her deposition held three years later, Mrs. Deorle stated that he was "screaming" but not swinging the board around. Either way, the undisputed fact is that Deorle, while screaming and on a rampage, was in possession of a board with protruding nails, and that he finally dropped it when Mahon took his pistol out of his holster.

Mahon was able to get Deorle's wife and children safely into his patrol car. Mrs. Deorle told Mahon that Deorle was depressed, that he had been drinking, that he was in a rage caused by his medication, that he previously had been arrested for assaulting her in a domestic incident, and that he had been on probation.

It is undisputed that after dropping the board, Deorle picked up two hatchets and a crossbow. According to Mrs. Deorle, the crossbow was of the type used for recreational target shooting, not hunting, and that "it does look serious." In her tape-recorded interview, she recalled that when the police on the scene asked her whether her husband had any weapons, she told them, "No, except he has a crossbow."[1]

Lt. Estes heard Deorle say that he wanted to die and that he would kill anyone who came on his property. It was around this time that Deputy Rutherford arrived on the scene and was briefed on all of the above. Deorle dropped the hatchets, but continued to hold the crossbow in his right hand. In his left hand he was carrying a can of lighter fluid. He dropped the crossbow, advanced toward Rutherford and then said something to the effect of, "I'm going to kick your ass, mother-fucker."

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[1] It is unclear whether the crossbow was loaded. However, two days after the incident, when asked in a recorded interview about whether the crossbow as loaded, Deorle replied, "Yeah, but shit, it wouldn't even put a hole in that wall right here." He also stated that the crossbow fired a "little arrow" that "basically" had a standard point like on a normal arrow. There is nothing in the record to suggest that the crossbow was a child's toy or looked like one.

It is undisputed that Rutherford was trained in the proper use of the so-called beanbag round, which was designed to knockdown and incapacitate a person so that an arrest can be effected. The majority is right; it is not a toy, but it is not designed to kill or injury. To the contrary, it is designed to prevent serious injury. Although virtually anything can cause death or serious injury under the right circumstances and the beanbag round is no exception, *see Vera Cruz v. City of Escondido*, 139 F.3d 659 (9th Cir. 1998), the undisputed evidence established that the firing of a beanbag round from a 12-gauge shotgun at a person's "center mass" from a distance of 20 to 40 feet is not reasonably likely to cause death or serious injury. Furthermore, the evidence is uncontradicted that the beanbag round was fired at Deorle's lower right abdomen but that it suddenly "flew up" and unexpectedly and unintentionally hit Deorle in the face.[2]

Under *Saucier v. Katz*, 121 S. Ct. 2151 (2001), the first issue is whether, taken in the light most favorable to Deorle, the facts show that a constitutional right was violated. The undisputed facts show that it was not. Deorle may have been sick, he may have been deranged, but that did not make him any less dangerous to the officers who responded to Mrs. Deorle's call for help. Deorle advanced toward Rutherford, threatening to harm him, while brandishing a quart can of lighter fluid. Rutherford had no duty to wait to be doused with a flammable liquid or to be set ablaze before acting to protect himself. The majority's insistence of portraying Deorle as unarmed is simply incorrect. He was armed with a container of lighter fluid and was advancing toward Rutherford while threatening to kick his ass. Rutherford may not have had the right to use deadly force at that point, but he had every right to protect himself with a degree of force likely only to temporarily incapacitate. That is what he did.

True, Rutherford did not issue a warning before firing the beanbag round at the advancing Deorle, but there is no telling, even in hindsight, what Deorle might have done had a warning been issued. Only a short time earlier, Deorle told his wife that he wanted to die and that if the police came on his property they would have to kill him –

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[2] It is interesting to note that the declaration of retired Sacramento Police Department Sgt. Peter A. Reedy, which is referred to twice in the majority opinion, contains not one word indicating that Sgt. Reedy has any experience, training or expertise with beanbag rounds.

and Rutherford knew that. Deorle might have surrendered, but he also might have attempted to set Rutherford on fire or engage in self-immolation. Deorle also might have kept on coming, and if he got closer than 20 feet away, the beanbag round could not have been sued. Then hand-to-hand combat would have been inevitable, which is not without its own serious, sometimes life-threatening, risks to suspects and officers alike. Under the circumstances, it was not objectively unreasonable for Rutherford to attempt to safely and preemptively subdue him as he did. *See Graham v. Connor*, 490 U.S. 386 (1989). As the Court said in *Saucier*, "If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed." 121 S. Ct. at 2158. Under *Saucier*, that should end the inquiry.

But even if Rutherford were mistaken about whether the amount of force he used was legal in the circumstances, the issue under the second part of the *Saucier* sequential analysis becomes whether the officer's *mistake* was reasonable. *Id.* "An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense." *Id.* This turns on whether the officer's conduct violated a "clearly established rule." *Id.* at 2160.

The facts outlined above demonstrate that Rutherford's response to Deorle's threatening actions, even if excessive, even if mistaken, was not an unreasonable mistake. It did not violate any clearly established rule. It is undisputed that he deployed a degree of force that he was trained to use and that he reasonably believed would subdue the advancing and threatening Deorle without doing any significant harm. Neither Deorle nor the majority, as required by the Supreme Court, "has identified any case demonstrating a clearly established rule prohibiting the officer from acting as he did." *Id.* The majority admits that "there is no prior case prohibiting the use of this specific type of force in precisely the circumstances here involved." Majority Op. at 11976. In fact, the best the majority can come up with is cases involving the use of pain compliance techniques, not in self-defense, but to disperse nonviolent protestors (*Forrester v. City of San Diego*, 25 F.3d 804 (9th Cir. 1994); *Headwaters Forest Def. v. County of Humbolt*, 240 F.3d 1185

(9th Cir. 2000)). Likewise, *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1366 (9th Cir. 1994) concerns the circumstances under which the police may storm a house, not self-defense. Neither *Brewer v. City of Napa*, 210 F.3d 1093 (9th Cir. 2000) nor *Headwaters Forest* held that warnings are required before deploying force. But even if they did, which they don't, they were decided four years *after* Rutherford's encounter with Deorle.

Because I believe that Rutherford was entitled to qualified immunity, I would affirm the granting of summary judgment in his favor and in favor of the Sheriff of Butte County. Accordingly, I respectfully dissent.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Richard Leo Deorle,
Plaintiff-Appellant,

v.

Greg Rutherford, Butte County Deputy Sheriff; Mick Grey, Butte County Sheriff; County of Butte,
Defendants-Appellees.

_____/

No. 99-17188

D.C. No.
CV-97-434-LKK

OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Argued and Submitted
December 12, 2000 – San Francisco, California

Filed March 16, 2001

Before: Myron Bright,* Stephen Reinhardt, and
Barry G. Silverman, Circuit Judges.

Opinion by Judge Reinhardt;
Dissent by Judge Silverman

*The Honorable Myron Bright, Senior United States Circuit Judge for the Eight Circuit, sitting by designation.

OPINION

REINHARDT, Circuit Judge:

Police Officer Greg Rutherford fired a "less lethal" lead-filled "beanbag round" into the face of Richard Leo Deorle, an emotionally disturbed resident of Butte County, California. Deorle was shot without receiving a warning and while unarmed. The projectile removed an eye and left lead shot implanted in his skull. We are presented on appeal with two issues: whether the force used was so excessive as to violate Deorle's fourth amendment rights; and, if so, whether Officer Rutherford is entitled to qualified immunity.

BACKGROUND[3]

On September 9, 1996, in Butte County, California, Richard Deorle (Deorle), upset at being diagnosed with Hepatitis C, and having consumed a half-pint of vodka and some Interferon, his prescribed medication, began behaving erratically. By four o'clock, Deorle had become suicidal. According to Mrs. Deorle, having "lost control of himself," Deorle began screaming and banging on the walls of their house. In search of someone to help her with her distressed husband, Mrs. Deorle dialed 911.[4]

Her call was answered by the police, who dispatched Officer Mahon to the Deorle residence. Mrs. Deorle, accompanied by their children, left the house. Deorle did not hinder their departure. He did, however, rather angrily, refuse to let Mahon enter the house without a warrant. Mahon escorted Deorle's family one block from their house, radioed for "Code 3 Backup," and requested that more officers be sent

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[3] When we review an order granting summary judgment to the defendant, we must view the relevant facts in the light most favorable to the plaintiff. *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998). That standard also applies to our determination of the defendants' entitlement to qualified immunity as a matter of law. *See Moran v. Washington*, 147 F.3d 839, 844 (9th Cir.1998)

[4] Mrs. Deorle testified that, when she dialed 911, Deorle was "just screaming. I don't remember any words, just screaming like in pain." She picked up the phone intending to get medical help, dialed 911, and left the phone on the dresser.

quickly.

At least 13 officers responded to Mahon's request for "backup."[5] These officers set up roadblocks on the streets around the house to ensure that Deorle had no avenue of escape, and awaited the arrival of a Special Incident Response Team ("SIRT") and a team of negotiators. SIRT members are trained to "arrest . . . suspects in the most efficient and least hazardous manner . . . [and] arrest suspect[s] with a minimum amount of risk or danger to the . . . suspect."

Deorle, though verbally intimidating, was physically compliant and followed all the officers' instructions. When a canine team "tested" his behavior by making their dog bark aggressively at Deorle, he retreated towards his house. When a wooden board from the porch railings came away in his hands, Deorle dropped it at the officers' command. Although shouting "kill me" and brandishing a hatchet at a police officer, he threw the hatchet away into a clump of trees when told to put it down. Officer Rutherford, who was at the scene for thirty to forty minutes, did not observe Deorle touch, let alone attack, anyone; he did, however, hear Deorle scream at him that he would "kick his ass."[6]

Rutherford was a member of the SIRT team. He was trained in the deployment of force against recalcitrant suspects and had arrived on the scene in response to Mahon's Code 3 call. After briefing by his superiors and consultation with another officer on the scene, he decided to reconnoiter closer to Deorle. Accompanied by officers Estes and Nichols, Rutherford observed Deorle for about five to ten minutes from the cover of some trees before Deorle, carrying an unloaded plastic

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[5] Rutherford, claims there were between five and ten police officers at Deorle's residence. Appellees' evidence in support of their summary judgment motion suggests that at least thirteen officers were at the scene when Deorle was shot, and a police log indicates that as many as 24 officers may have been present before or immediately after the shooting.

[6] Rutherford also stated that no-one reported to him that Deorle had touched or attacked anyone.

crossbow in one hand[7] and what may have been a bottle of charcoal lighter fluid in the other,[8] started shouting at the officers. Rutherford was armed with a twelve-gauge shotgun loaded with what appellees term a "less-lethal" or "beanbag" round. These rounds are made of lead shot contained in a cloth sack, and are small enough to be fired from a shotgun.[9] The rounds "could have lethal capabilities" at thirty feet, and are potentially lethal up to fifty feet.[10]

In response to Deorle's taunts, Rutherford shouted at him to put down the crossbow and Deorle "discarded" it.[11] According to Rutherford, Deorle then:

> walk[ed] directly at me at a steady gate [sic]. . . . He didn't run at me, he didn't take his time getting to me, it was just a steady walk directly at me. . . .Once he started walking towards me I took a little wider stance

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[7] The dissent says that it is unclear whether the crossbow was loaded. If it were unclear, we would be required to assume for purposes of summary judgment that the crossbow was not loaded. Here, however, Rutherford, himself, acknowledged that the crossbow was unloaded when he observed Deorle. *See* Transcript of Deposition of Greg Rutherford, dated July 29, 1998 at 60:25-26.

[8] In his deposition, Rutherford testified at various times that he observed a plastic bottle in Deorle's hand, but stated equally unequivocally at other points that it was a can that he observed. He also stated that it was lighter fluid that Deorle was carrying because he could tell that from the type of container in Deorle's hand. Indeed, Rutherford said he could distinguish what type of lighter fluid it was – charcoal lighter fluid rather than that used to fill cigarette lighters – because of its container (apparently, whether that container was a can or a plastic bottle). We also note that Rutherford observed the can or bottle at a distance of more than thirty feet.

[9] The shot is enveloped in cloth to prevent its spreading and peppering the target. The shot, thus encased, is expelled from a twelve-gauge shotgun at a speed of between 280 and 300 feet per second, and delivers a force sufficient to knock someone off his feet and render him incapable of resistance.

[10] Transcript of Deposition of Greg Rutherford, dated July 29, 1998, at 99:23-24.

[11] Nowhere in the record is there any mention of any other instruction or order given by Rutherford.

> with my feet to get a good stable base. As I leaned my weapon up against the tree to make it more stable and I focused on his lower right rib area as he was walking towards me for a target area.[12]

Rutherford did not warn Deorle that he was going to shoot him. Nor did he order Deorle to halt. Instead, he waited until Deorle reached the predetermined point, then fired. The cloth-cased shot struck Deorle in the face, knocked him off his feet, and lodged "half out of his eye." He suffered multiple fractures to his cranium, loss of his left eye, and embedded lead shot in his skull. A team of negotiators was still en route when Deorle was shot.

Deorle sued Rutherford, Mick Grey (the Butte County Sheriff), the County of Butte, and Defense Technology Corporation (the manufacturer of the cloth-cased shot), for, among other things, excessive force in violation of the fourth amendment. Rutherford and Grey asserted qualified immunity and moved for summary judgment. The district court held that Rutherford was entitled to qualified immunity, that he did not violate Deorle's right to be free from excessive force, and that there was therefore no basis for holding the other defendants liable. The court granted summary judgment for defendants and denied Deorle's motion for reconsideration. This appeal followed. The excessive-force claim against Officer Rutherford, which was dispositive in the court below, is the only issue presented by the parties on appeal.

STANDARD OF REVIEW

A court reviews de novo the issue of whether an officer's use of force was objectively reasonable under the circumstances. *See Liston v. County of Riverside*, 120 F.3d 965, 976 (1997). A district court's

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[12] In a statement given to Oroville Police Department Sgt. Nicholson on the day of the shooting, Rutherford stated that "the suspect kept coming closer to him and when the suspect went passed [sic] a similar sized tree, approximately 30 feet away from him, he decided that the subject had approached and was in an uncomfortable position for him. Deputy Rutherford felt he was in jeopardy and if he passed the tree, that he would shoot the subject. Deputy Rutherford said the weapon had already been aimed at the suspect when he noticed him approaching with the cross bow. He said that when the subject got passed [sic] the tree, he shot the round at the subject."

decision to grant summary judgment is also reviewed de novo. *See Crow Tribe of Indians v. Raciot*, 87 F.3d 1039, 1043 (9th Cir. 1996).

DISCUSSION

[1] When government officials assert the defense of qualified immunity to an action under 42 U.S.C. § 1983, a court evaluating the defense must first determine whether the plaintiff has shown the deprivation of a constitutional right. *Wilson v. Layne*, 526 U.S. 603, 609 (1999). If so, the court then must determine " 'whether the right was clearly established at the time of the alleged violation,' " *id.* (quoting *Conn v. Gabbert*, 526 U.S. 286, 290 (1999)), and whether a reasonable officer could have believed his conduct was lawful. *See Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993); *Mendoza v. Block*, 27 F.3d 1357, 1360 (9th Cir. 1994). Accordingly, we first examine whether the force used to subdue Deorle was excessive as a matter of law.

I. Excessive Force

[2] We examine the use of force to effect an arrest in light of the Fourth Amendment's prohibition on unreasonable seizures. *Graham v. Connor*, 490 U.S. 386 (1989); *Chew v. Gates*, 27 F.3d 1432, 1440 (1994). The officer's actions are measured by the standard of objective reasonableness, *Graham*, 490 U.S. at 397. The reasonableness of the force used to effect a particular seizure is determined by "careful[ly] balancing . . . 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). As we have held, "[t]he force which [i]s applied must be balanced against the need for that force." *Liston v. County of Riverside*, 120 F.3d 965, 976 (1977). *See also Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367 (9th Cir. 1994).

A. Nature and Quality of Intrusion

We first assess the quantum of force used to arrest Deorle by considering "the type and amount of force inflicted." *Headwaters Forest Def. v. County of Humbolt*, 211 F.3d 1121, 1133 (9th Cir. 2000) (internal quotation marks omitted) (quoting *Chew*, 27 F.3d at 1440). In the

instant case, Rutherford shot Deorle using a lead-filled, "less-lethal" round.[13] This cloth-cased shot, which is something akin to a rubber bullet, is defined as a "long-range impact weapon."[14] It is fired from a 12-gauge shotgun, and calculated to stop "people who are violent or hostile and are threatening injury or death to themselves or others." By Rutherford's own admission, the cloth-cased shot was potentially lethal at thirty feet and could be lethal at distances up to fifty feet. Also by Rutherford's own admission, "[t]he target area for lethal capabilities would probably be the facial area. . . . If it impacted at the heart it could stop the heart or possibly tear a vital artery." Rutherford shot at Deorle's torso from thirty feet: the round hit Deorle in the head and removed his left eye and lodged pieces of lead shot in his skull.

The force used was obviously enough to cause grave physical injury. It knocked Deorle off his feet, and removed one of his eyes. The force applied through use of the cloth-case shot can kill a person if it strikes his head or the left side of his chest at a range of under fifty feet. Such force is much greater than that applied through the use of pepper spray, *see Headwaters Forest*, 211 F.3d at 1138, or a painful compliance hold, *see Forrester v. City of San Diego*, 25 F.3d 804, 806 (9th Cir. 1994)(police force's "pain compliance unit" dispersed demonstrators using "Orcutt Police Nonchakus" – two sticks of wood connected at one end by a cord – or using wrist-and arm-twisting and pressure point holds), and more likely to cause a life-threatening injury than most dog bites. *See Vera Cruz v. City of Escondido*, 139 F.3d 659, 663 (9th Cir. 1997).

[3] However, the cloth-cased shot appears to fall short of deadly force, defined in this circuit, as "that force which is *reasonably likely* to cause death." *Vera Cruz*, at 663 (emphasis added).[15] The shot

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[13] The appellees also call the cloth-cased shot a "beanbag" round. That euphemism grossly underrates the dangerousness of this projectile. The round is not some sort of "hackey-sack." It is a projectile capable of inflicting serious injury or death, rather than some children's toy.

[14] *See* the affidavit of Peter A. Reedy, a Sergeant with the Sacramento Department Force for 20 years, dated March 16, 1999, and filed in support of Deorle's opposition to defendants' motion for summary judgment.

[15] The extremely high deadly-force standard enunciated in *Vera Cruz* is unique to this circuit. *See id.* at 663.

is not like a regular bullet – it does not normally rip through soft tissue and bone on contact with the human body. It is designed to knock down a target, rendering the individual incapable of resistance, without (in the normal course of deployment) resulting in death. Nonetheless, the cloth-cased shot constitutes force which carries a significant risk of serious injury, and, thus, is not to be deployed lightly.[16] To put it in terms of the test we apply: it is to be used only when a strong governmental interest compels the employment of so high a degree of force.

B. Governmental Interests at Stake

[4] We measure the governmental interests at stake by evaluating a range of factors: they include " '(1) the severity of the crime at issue, (2) whether the suspect pose[d] an immediate threat to the safety of the officers or others . . . (3) whether he [was] actively resisting arrest or attempting to evade arrest by flight,' and any other 'exigent circumstances [that] existed at the time of the arrest.' " *Headwaters Forest*, 211 F.3d at 1133 (quoting *Chew*, 27 F.3d at 1440-1441 & n.5). These factors, however, are simply a means by which to determine objectively "the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97.

[5] The character of the offense is often an important consideration in determining whether the use of force was justified. *See Chew*, 27 F.3d at 1442 & n.9; *Headwaters Forest*, 211 F.3d at 1138-1139 (same). In this case, the officers were initially on, or attempting to enter, Deorle's property without a warrant. They arrived, not to arrest him, but to investigate his peculiar behavior. Deorle was clearly a deeply troubled, emotionally disturbed individual. Mrs. Deorle testified that pain, induced by a reaction to his medication, had driven Deorle "out of control. He just didn't want to live any more." Deorle repeatedly asked officers to shoot him. Lt. Estes, reported that Deorle shouted he "[ha]d no reason to live . . . that the pain was unbearable, and that he wanted to be done with the pain, and that there was no use

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[16] According to the affidavit of Peter A. Reedy, "[t]he Use of Force Continuum, as used in California, would list an impact weapon high on the schedule of force. . . . It would be unreasonable for an officer to use an impact weapon on an unarmed person."

in continuing." Officer Johnson, Rutherford's superior, heard Deorle asking other officers to kill him. Instead of seeking to counsel Deorle, at some point the officers determined to use force to arrest him. They started by "testing" him with a police dog, and ended by firing the cloth-cased shot in his face. Deorle was eventually charged with obstructing the police in the performance of their duties. *See* Cal. Pen. Code § 69.

[6] The problems posed by, and thus the tactics to be employed against, an emotionally distraught individual who is creating a disturbance or resisting arrest are, and must be, differentiated from those involved in efforts to subdue an armed and dangerous criminal who has recently committed a serious offense. In the former instance, increasing the use of force may, in a number of circumstances, exacerbate the situation; in the latter instance, a heightened use of the less-than-lethal force will ordinarily be helpful in bringing a dangerous situation to a swift end. In the case of mentally unbalanced persons, the use of officers and others trained in the art of counseling is ordinarily advisable, and may provide the best means of ending the crisis. Even when an emotionally disturbed individual is "acting out" and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a criminal, but with a mentally ill person.

[7] We acknowledge that police officers' decisions about the appropriate amount of force to use in a given circumstance "are often . . . split-second judgments [made] in circumstances that are tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 396-97; *see also Washington v. Lambert*, 98 F.3d 1181, 1186 (9th Cir. 1996). However, the situation here was far from that of a lone police officer suddenly confronted by a dangerous armed felon threatening immediate violence. Rutherford was at the scene for over half an hour before he shot the emotionally disturbed Deorle. He had an opportunity to consult with his superiors before approaching the reconnoiter. *Compare Chew*, 27 F.3d at 1142. During that time, Deorle did not attempt to evade arrest by flight: he stayed on or adjacent to his own property. He did not pose an immediate safety threat: he responded to the officers' instructions and did not attack anyone. He threw down his potential weapons when ordered to do so.

[8] Rutherford observed Deorle at close proximity for about five to ten minutes before shooting. His testimony is that he fired his shotgun as Deorle was walking towards him, at a steady gait, and without any weapons.[17] Rutherford decided that he would shoot when Deorle came within a certain range, steadied himself against a tree, and waited until Deorle reached that point; then, without a command to stop or a warning that force would be employed, he pulled the trigger. Rutherford did not make a split-second choice. *See Headwaters Forest*, 211 F.3d at 1138 (a reasonable fact finder could conclude that the decision to use non-lethal force was not made in the heat of the moment).[18] Rather, he evinced unhurried deliberation in shooting Deorle.

[9] Of course, Deorle might never have passed the predetermined spot had Rutherford given him the warning to which he was entitled or a command to halt. An officer must give a warning, when feasible, before shooting a suspect. *See Garner*, 471 U.S. at 11-12; *Jensen v. City of Oxnard*, 145 F.3d 1078, 1086 (9th Cir. 1998). Officers provide warnings, where possible, even when the force used is less than deadly. *See Brewer v. City of Napa*, 210 F.3d 1093, 1094-1095 (9th Cir. 2000)(police officer gave warning before setting dog on suspect); *Vera Cruz*, 139 F.3d at 660 (same); *Headwaters Forest*, 211 F.3d at 1129 (police warned protesters before use of pepper spray); *Katz*, 194 F.3d 970 (violently grabbing protester without warning and throwing him into police van was fourth amendment violation). Here, there was ample time to give a warning but no warning was given. Rutherford does not remember giving a warning; nor do any of the other eleven witnesses mention his doing so when describing the events

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[17] Deorle was wearing no shirt or shoes, only a pair of cut-off jeans shorts. There was nowhere for him to secrete any weapons.

[18] Nothing in the record before us suggests Rutherford considered other, less dangerous, methods of stopping Deorle. *See Headwaters Forest*, 211 F.3d at 1139 (holding that, where use of force is potentially lethal, police "were required to consider '[w]hat other tactics if any were available' to effect their arrest"); *Chew*, 27 F.3d at 1443 (same). In fact, other officers used a police dog to provoke him: a "police tactic that needlessly or unreasonably creates a dangerous situation necessitating an escalation in the use of force," and a course of action this circuit has expressly refused to endorse. *See Cunningham v. Gates*, 229 F.3d 1271, 1291 n.23 (9th Cir. 2000).

they saw or heard.[19] At most, Rutherford may have shouted "less lethal."[20] That cryptic statement was insufficient to alert a target to the force about to be deployed, and does not satisfy the pre-use of force warning requirement.

C. Weighing the Conflicting Interests

[10] Viewing the facts presented by the record in the light we must, even though Rutherford used force that is properly classified as less than deadly, the force used was excessive compared to the governmental interests at stake. Deorle was obviously a deeply emotionally disturbed person. He had suffered such a severe reaction to his prescription medication that he begged various officers to shoot him to end the pain. Despite his distraught condition, however, he did not attack anyone. Instead, Officer Rutherford fired the cloth-cased round at him and left him with the lead shot impacted in his skull and the cloth-cased round sticking "half out of his eye." Under the fourth-amendment objective-reasonableness standard, the shooting violated Deorle's right to be free from unreasonable seizures. *See Garner*, 471 U.S. at 7.[21] We now consider whether Rutherford is protected by the

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[19] At oral argument, appellee's counsel claimed that it was Rutherford's usual practice to give a warning before shooting. While that testimony would not have changed our analysis, there is no evidence in the record before us that supports counsel's claim, and certainly no foundational evidence, such as how many times Rutherford had shot people in the past.

[20] Officer Estes claims to have heard Rutherford shout "less-lethal" before firing. Officer Smith claims Rutherford shouted "less-lethal," but cannot remember whether it was before or after the shot was fired. It is just as likely that both officers heard Lt. Nichols, who admitted that he shouted "less than lethal" after Rutherford fired the cloth-cased shot "so other officers would know what had occurred." Estes and Smith are the only witnesses who remember hearing Rutherford shout such an utterance. None of Nathaniel and Jennifer Risley, Rhonda Deorle, or Mr. Stonebraker mention any warning, although they heard a shot. Officers Muldown, Collins and Nichols heard a shot but no warning, and Rutherford's affidavit does not mention any shouting of a warning before firing.

[21] The dissent is simply wrong when it insists that the undisputed fact is that the force used against Deorle was not reasonable likely to cause serious injury. There is, at the very least, a genuine issue of material fact in the record as to that question. In any event, the question is not of substantial significance here. The "reasonably likely to cause serious injury" inquiry is a part of the deadly-force determination in all other

defense of qualified immunity.

II. Qualified Immunity

[11] The individual defendants, to the extent they have been sued in their individual capacities for violating § 1983, have raised the affirmative defense of qualified immunity. The doctrine of qualified immunity insulates government agents against personal liability for money damages for actions taken in good faith pursuant to their discretionary authority. *See Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). However, "governmental officials . . . generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818.

[12] In excessive-force cases, this circuit measures qualified immunity by the same standard it measures the excessive force at issue. In other words, the qualified immunity test is the same as the test on the merits. *See Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994); *Headwaters Forest*, 211 F.3d at 1141; *Alexander*, 29 F.3d at 1367; *Chew*, 27 F.3d at 1449 n.19. Accordingly, in line with established Ninth Circuit precedent, it is clear that because, on the facts presented, viewed in the light most favorable to the plaintiff, the force used was unreasonable, Rutherford is not entitled to qualified immunity.[22]

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circuits that have defined "deadly force." We have, wisely or not, rejected the test all others employ. *See* n.13, *supra*. In the case before us, however, the question is not whether the force was "deadly." Regardless of how we classify particular types of force, the evidence in the record before us makes it clear that the force used by Rutherford is quite capable of causing serious injury to the person shot. Accordingly, "deadly" or not, such force may not be used except when a strong governmental interest warrants its use, and then, only following a warning, if feasible. We should also note that to examine the possibility of serious injury, as does the dissent, on the basis of the assumption that a shot from a shotgun will hit the precise part of the body at which it is aimed by the shooter, is not only unsupported by the record, but contrary to the experience and training of law enforcement agencies.

[22] We note that in at least one instance we have found the use of force unreasonable but have granted qualified immunity. In *Hammer v. Gross*, 932 F.2d 842, 850 (1991)(en banc) we found that under the Supreme Court cases that controlled at the time of the forcible taking of the defendant's blood over his vigorous objections, the seizure was not unlawful, but that an intervening Supreme Court decision had changed

We note, however, that the Supreme Court has recently granted certiorari in *Katz v. United States*, 194 F.3d 962, 967 (9th Cir. 1999), *cert. denied*, ___U.S.___, 121 S.Ct. 480 (2000). *Katz* collects the cases that demonstrates that the overwhelming majority of circuits that have addressed the issue of qualified immunity for unreasonable uses of force follow the same rule as the Ninth Circuit, with the Fifth Circuit being the sole exception. The Fifth Circuit's rule is set forth in *Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1998), in which a jury found that the police officer's use of force was excessive, but then granted him qualified immunity. *Id.* at 800. The Fifth Circuit upheld the jury verdict, applying a separate qualified-immunity test that first determines whether the officer's use of force violated clearly established law, then inquires whether, on the facts as they appeared to the officer, he reasonably could have believed that he was not violating that law, or, as the Fifth Circuit put it, whether the circumstances indicate that "the officer . . . ma[de] a constitutionally reasonable judgment based on a factual misperception." *Id.* (internal quotations omitted) (quoting *Melear v. Spears*, 862 F.2d 1177, 1188 (5th Cir. 1989) (Higginbotham, J., concurring). Thus, the Fifth Circuit applies a traditional qualified immunity test to excessive force cases. In the case before us, we reach the identical result applying the traditional qualified immunity test as we do applying the "same as the merits" rule that we, and most of the other circuits, follow.

[13] In applying the first part of the traditional qualified-immunity test — whether the law was clearly established — we start with the general proposition that the use of force that is objectively unreasonable is unlawful and that it is not necessary that a court have determined previously that the precise use of the particular force under similar circumstances is excessive. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (requiring only that "the contours of the right . . . be sufficiently clear that a reasonable official would understand that what he is doing violated that right"). As we said in *Mendoza v. Block*:

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the law. Thus, one exception to our general rule is where, after the date of the incident, there has been a change in the law that renders previously permissible force impermissible. In such circumstances, the officer *is* entitled to qualified immunity. Such is not the case here, however. The law has never held the type of conduct displayed here to be constitutional.

> We do not believe that a more particularized expression of the law is necessary for law enforcement officials . . . to understand that under some circumstances the use of such a "weapon" might become unlawful. For example, no particularized case law is necessary for a deputy to know that excessive force has been used when a deputy sics a canine on a handcuffed arrestee who has fully surrendered and is completely under control. An officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury.

27 F.3d at 1362 (citing *Anderson*, 483 U.S. at 640). It is therefore irrelevant "whether [the use of force] involves physical restraint, use of a baton, use of a gun, or use of a dog." *Id.* (citing *Anderson*, 483 U.S. at 640). When it should be apparent to any reasonable officer that the force he uses is excessive, there is no justification for granting qualified immunity. Deorle was distraught, disoriented, and emotionally disturbed. Rutherford shot him using a round composed of lead shot enclosed by a cloth casing and fired at speeds of up to three-hundreds feet per second from a twelve-gauge shotgun. The force, designed to render a person incapable of resistance, was listed higher on the California police's "escalation of force" chart than other types of force short of deadly force that have sometimes been held to be excessive in this circuit. *See, e.g., Chew*, 27 F.3d at 1443. Although there is no prior case prohibiting the use of this specific type of force in precisely this type of situation, that is insufficient to entitle Rutherford to qualified immunity.

[14] In addition, it has been long settled that an officer has a duty to warn, where feasible, before using significant force capable of causing serious injury upon an unarmed suspect. *See Garner*, 471 U.S. at 11-12; *Quintanilla v. City of Downey*, 84 F.3d 353, 357 (9th Cir. 1996). This is so whether the force is classified as deadly or less than deadly. *See Quintanilla*, 84 F.3d 354 (police officer gave warning before setting dog on suspect); *Mendoza*, 27 F.3d 1362 (proper, for purposes of qualified immunity inquiry, for court to determine whether officer had given warning before setting dog on suspect); *Forrester v. City of San Diego*, 25 F.3d 804, 806 (9th Cir. 1994) (before each arrest, protesters warned that they would be subject to pain compliance

measures if they did not move). *See also Headwaters Forest*, 211 F.3d at 1129 (police warned protesters before use of pepper spray).; *Katz*, 194 F.3d at 970 (violently grabbing protester without warning and throwing him into police van was forth amendment violation). Where a firearm is used by members of law enforcement, the phrase "Halt or I'll shoot!" has long been a part of our national culture, and it is familiar to most youngsters whether they grow up reading books, watching television, or both. The commonly acknowledged and well-known practice of warning suspects, whenever feasible, before subjecting them to force that may cause serious injury demonstrates that "the defendant['s] conduct [wa]s so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, [and] closely analogous pre-existing case law is not required to show that the law is clearly established." *DeBoer v. Pennington*, 206 F.3d 857, 864-865 (9th Cir. 2000).[23] By shooting Deorle with the cloth-cased shot without giving him a warning, Rutherford failed to act in accordance with clearly established law.

[15] Furthermore, under the second part of the Fifth Circuit's qualified-immunity standard, Rutherford could not have reasonably believed that his actions would not violate Deorle's constitutional rights. The facts in this case are stark: as these facts appeared to Rutherford, he could not have made a reasonable judgment that the force he used was constitutional. Deorle was an emotionally disturbed individual; disoriented, "out of control," and possibly intent upon suicide. At the time Rutherford shot him, Deorle was unarmed and walking towards Rutherford at a normal gait. Despite Deorle's confused state, Rutherford determined that he would shoot at such time as Deorle reached a point thirty feet away. Without giving a warning, or even demanding that he stop his approach, Rutherford waited until Deorle came within the pre-established range, then fired. No officer could

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[23] These cases establish that, where possible, the warning must immediately precede the use of force, *see Harris v. Roderick*, 126 F.3d 1189, 1201 (9th Cir. 1997) (holding that it was clearly established in 1992 that a policy mandating use of deadly force without an appropriate warning was an unconstitutional use of force), and the warning must not merely demand compliance with instructions, but advertise that the use of force will follow any failure to comply. *See Chew*, 27 F.3d at 1443 n.10 (citing *Reed v. Hoy*, 909 F.2d 324, 330 (9th Cir. 1989)). Here, on the record before us, there was ample time to give a warning, but no warning was given.

reasonably have believed that under these facts the shooting constituted reasonable force.[24] Accordingly, applying either the Ninth Circuit's standard or the Fifth Circuit's traditional qualified-immunity standard, and viewing the facts in the light most favorable to the plaintiff, Rutherford was not entitled to qualified immunity for his use of excessive force.

CONCLUSION

Viewing the facts in the light we must, we conclude that, for purposes of summary judgment, Rutherford's use of force was excessive and the defense of qualified immunity is unavailing. At a distance of thirty feet, Rutherford shot at a man who would have been better placed in a hospital than in custody. The degree of force was clearly in excess of the governmental interest at stake, and was used in circumstances that did not justify the failure to warn. There was no basis for any factual misperception and no reasonable officer could have concluded that the force employed was constitutional. Accordingly, we reverse the grant of summary judgment and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

SILVERMAN, Circuit Judge, dissenting:

The essential facts are not disputed. Plaintiff Richard Deorle was deranged and out of control when Deorle's wife made the 911 cal to the police. When Deorle saw his wife on the telephone calling for help, he told her that they would have to come kill him.

After the first deputy sheriff (Mahon) arrived at the scene, Deorle was observed holding a two-by-six board with nails protruding from the end of it. According to Mrs. Deorle's taped-recorded statement on the day in question, Deorle "was so angry, that he just started lifting up the porch, you know the board, it has a railing and he lifted up the railing and he was like swinging it" like a baseball bat. At her

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[24] Nor, as noted earlier, was the state of the law different at the time summary judgment was granted than at the time the incident occurred. *See* n.20, *supra*.

deposition held three years later, Mrs. Deorle stated that he was "screaming" but not swinging the board around. Either way, the undisputed fact is that Deorle, while screaming and out of control, was in possession of a board with protruding nails, and that he finally dropped it when Mahon took his pistol out of his holster.

Mahon was able to get Deorle's wife and children safely into his police car. Mrs. Deorle told Mahon that Deorle was depressed, that he had been drinking, that he was in a rage caused by his medication, that he previously had been arrested for assaulting her in a domestic incident, and that he had been on probation.

It is undisputed that after dropping the board, Deorle picked up two hatchets and a crossbow. According to Mrs. Deorle, the crossbow was of the type used for recreational target shooting, not hunting, and that "it does look serious." In her tape-recorded interview, she recalled that when the police on the scene asked her whether her husband had any weapons, she told them, "No, except he has a crossbow."[1]

Lt. Estes heard Deorle say that he wanted to die and that he would kill anyone who came on his property. It was around this time that Deputy Rutherford arrived at the scene and was briefed on all of the above. Deorle dropped the hatchets, but continued to hold the crossbow in his right hand. In his left hand he was carrying a can of lighter fluid. He dropped the crossbow, advanced toward Rutherford and then said something to the effect of, "I'm going to kick your ass, mother-fucker."

It is undisputed that Rutherford was trained in the proper use of the so-called beanbag round, which is designed to knockdown and incapacitate a person so that an arrest can be effected. The majority is right; it is not a toy, but it is not designed to kill or injure. To the contrary, it is designed to prevent serious injury. Although virtually

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[1] It is unclear whether the crossbow was loaded. However, two days after the incident, when asked in a recorded interview about whether the crossbow was loaded, Deorle replied, "Yeah, but shit, it wouldn't even put a hole in that wall right here." He also stated that the crossbow fired a "little arrow" that "basically" had a standard point like on a normal arrow. There is nothing in the record to suggest that the crossbow was a child's toy or looked like one.

anything can cause death or serious injury under the right circumstances and the beanbag round is no exception, *see Vera Cruz v. City of Escondido*, 139 F.3d 659 (9th Cir. 1998), the undisputed evidence established that the firing of a beanbag round from a 12-gauge shotgun at a person's "center mass" from a distance of 20 to 40 feet is not reasonably likely to cause death or serious injury.

I view these undisputed facts the way the district judge did. Deorle may have been sick, he may have been deranged, but that did not make him any less dangerous to the officers who responded to Mrs. Deorle's call for help. Deorle advanced toward Rutherford, threatening to harm him, while carrying a quart can of lighter fluid. Rutherford had no duty to wait to be doused with a flammable liquid or to be set ablaze before acting to protect himself. Rutherford may not have had the right to use deadly force at that point, but he had every right to protect himself with a degree of force likely only to temporarily incapacitate. That is what he did. The evidence is uncontradicted that the beanbag round was fired at Deorle's lower right abdomen but that it suddenly "flew up" and unexpectedly and unintendedly hit Deorle in the face.

A key ingredient of the majority's qualified immunity analysis is its view that an officer has a duty to warn, if possible, before deploying any force, even a degree of force that is not reasonably likely to cause death or serious injury. The problem is that none of the cases cited by the majority has so held.[2] Maybe the law ought to require a police officer to give a warning before such force is used. However, the issue at the moment is whether such a requirement was clearly established on September 9, 1996, the date on which Rutherford was called to the Deorle home. It was not.

Where does this leave us? The undisputed facts show that Rutherford, without warning, used a degree of force that was not reasonably likely to cause death or serious injury, against a deranged man whose behavior prompted his wife to call 911, who police saw in possession of a board with protruding nails, then two hatchets, then a

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[2] *Brewer v. City of Napa*, 210 F.3d 1093 (9th Cir. 1998); *Vera Cruz v. City of Escondido*, 139 F.3d 659 (9th Cir. 1998); *Headwaters Forest Def. v. County of Humbolt*, 211 F.3d 1121 (9th Cir. 2000) *superceded by* 2000 WL 33141957 (2000); *Katz v. United States*, 194 F.3d 962 (9th Cir. 1999), *cert. granted*, 1212 S.Ct. 480 (2000).

crossbow, and who was *then* advancing toward Rutherford with a can of flammable liquid while declaring his intention to do Rutherford harm. I agree with the district judge. Rutherford is entitled to qualified immunity because a reasonable officer could have believed that his conduct was lawful. *Act Up!/Portland v. Bagley*, 988 F.2d 868 (9th Cir. 1993). I would affirm the granting of summary judgment in favor of Rutherford and the Sheriff of Butte County.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

Richard Leo Deorle,

Plaintiff,

v.

Greg Rutherford, Butte County Deputy Sheriff; Mick Grey, Butte County Sheriff; County of Butte,

Defendants.

/

NO. CIV. S-97-434-LKK/PAN

ORDER

FILED
MAY 4 1999
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

On April 8, 1999, the undersigned granted summary judgment in favor of the following defendants in the above-captioned matter: the County of Butte, Sheriff Mick Grey and Officer Greg Rutherford. Plaintiff has filed a motion for reconsideration of that order.[1]

Local Rule 78-230(k) states that a motion for reconsideration should include "what new or different facts or circumstances are claimed to exist which did not exist or were not shown upon such prior motion, or what other grounds exist for the motion." Plaintiff bases his motion for reconsideration on the contention that, instead of deploying beanbag rounds, Officer Rutherford could have engaged plaintiff in hand-to-hand combat. Plaintiff made this very argument in his opposition to defendants' motion for summary judgment.

Accordingly, plaintiff has failed to meet the standards established by Local Rule 78-230(k), and his motion for reconsideration

[1] On April 12, 1999, after the court had already heard oral argument on defendants' motion for summary judgment, plaintiff filed an application for leave to amend his opposition to defendants' motion for summary judgment. Then, on April 16, 1999, plaintiff filed a motion for reconsideration of the court's order granting summary judgment in defendants' favor. The two documents present the same argument, and therefore the court considers them together.

is hereby DENIED.

IT IS SO ORDERED.

DATED: May 3, 1999.

/S/ LAWRENCE K. KARLTON
LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

Richard Leo Deorle,

Plaintiff,

v.

Greg Rutherford, Butte County Deputy Sheriff; Mick Grey, Butte County Sheriff; County of Butte,

Defendants.

/

NO. CIV. S-97-434-LKK/PAN

ORDER

FILED
APRIL 13, 1999
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Before the court is a motion for summary judgment filed by the County of Butte, Sheriff Mick Grey and Officer Greg Rutherford. The court resolves the motion on the pleadings and papers filed herein and after oral argument.

I.

FACTS[1]

At approximately 4:00 p.m. on September 9, 1996, Ronda Deorle, the wife of plaintiff Richard Deorle, called 9-1-1 from her home. She reported that her husband had been screaming and hitting the walls. Deorle concedes that he was in a volatile, agitated state and that he had lost control of himself.

The Butte County Sheriff's Department dispatched Deputy George Mahon to the Deorle home, which was located in a residential neighborhood. Once he arrived, Mrs. Deorle and the children left the house. Shortly thereafter, Deorle came outside carrying a large two-by-six board with protruding nails. Deorle proceeded to the driveway near

[1] The facts as stated herein are undisputed unless otherwise noted.

Deputy Mahon. Eventually, he dropped the board. Deputy Mahon then turned around to interview Mrs. Deorle. She informed Deputy Mahon that her husband had been arrested for assaulting her a few years earlier and that recently he had been feeling depressed. When Deputy Mahon turned to face Deorle again, he noticed that Deorle held a roofing hatchet in each of his hands.

Eventually, a handful of police officers from various jurisdictions arrived at the scene. Sheriff's deputies used patrol vehicles to block the intersections near Deorle's residence. Deorle then began walking up and down the road in front of his home with a roofing hatchet and a loaded crossbow pistol.[2] Officers on the scene contacted a Special Incident Response Team (SIRT) which included defendant Deputy Greg Rutherford.

Upon arriving at the scene, Deputy Rutherford learned that Deorle had threatened officers with various weapons and that he was under the influence of alcohol. Under the circumstances, Rutherford determined that the use of less-lethal force would be appropriate. Rutherford advised officers on the scene that he had been trained in the use of less-lethal force and that he was authorized to use such force. Rutherford loaded his shotgun with less-lethal beanbag rounds and approached the area where Deorle was wandering. Another officer accompanied Rutherford as backup.

Once Deorle saw Deputy Rutherford, he began to taunt and threaten him. Rutherford noticed that Deorle had a crossbow in his right hand and a can of lighter fluid in his left hand and became concerned that Deorle might harm someone. Accordingly, Rutherford made the decision to deploy the less-lethal beanbag rounds if Deorle came within thirty feet of him, which in accordance with his training he determined was the appropriate distance for firing the beanbag rounds.

Rutherford ordered Deorle to drop his weapons. Deorle threw down his crossbow and then approached Rutherford in a threatening manner. As he advanced toward Rutherford, Deorle threatened to attack him. When Rutherford believed that Deorle was thirty feet away

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[2] Plaintiff contends that the crossbow was a toy, not a real weapon.

from him, he deployed the less-lethal round with the intent of knocking Deorle down and then arresting him.

Deputy Rutherford contends that he aimed the round at Deorle's right lower rib area. Deorle contends that Rutherford aimed at his chest. Wherever Rutherford aimed, the parties agree that, once deployed, the beanbag unexpectedly veered up and to Rutherford's right, striking Deorle in the left eye and ultimately causing the loss of that eye.

Deorle sues the manufacturer of the beanbag rounds for negligence and strict products liability. Deorle also sues the County of Butte, Deputy Rutherford and Butte County Sheriff Mick Grey for allegedly violating his fourth amendment right to be free from excessive force. Both sets of defendants have moved for summary judgment. This order addresses the motion filed by the County defendants.

II.

STANDARDS

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); See also Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Owen v. Local No. 169, 971 F.2d 347, 355 (9th Cir. 1992).

Under summary judgment practice, the moving party

> [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and

admissions on file.'" Id. Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Id. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." Id. at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); see also First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288-89 (1968); Ruffin v. County of Los Angeles, 607 F.2d 1276, 1280 (9th Cir. 1979), cert. denied, 455 U.S. 951 (1980).

In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Rule 56(e); Matsushita, 475 U.S. at 586 n.11; See also First Nat'l Bank, 391 U.S. at 289; Strong v. France, 474 F.2d 747, 749 (9th Cir. 1973). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under governing law, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, Anderson, 477 U.S. 248-49; See also Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." First Nat'l Bank, 391 U.S. at 290; See also

T.W. Elec. Serv., 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.' " Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P 56(e) advisory committee's note on 1963 amendments); See also International Union of Bricklayers & Allied Craftsman Local Union No. 20 v. Martin Jaska, Inc., 752 F.2d 1401, 1405 (9th Cir. 1985).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Rule 56(c); See also SEC v. Seaboard Corp., 677 F.2d 1301, 1305-06 (9th Cir. 1982). The evidence of the opposing party is to be believed, Anderson, 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party, Matsushita, 475 U.S. at 587 (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam)); See also Abramson v. University of Hawaii, 594 F.2d 202, 208 (9th Cir. 1979). Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd 810 F.2d 898, 902 (9th Cir, 1987).

Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " Matsushita, 475 U.S. at 587 (citation omitted).

III.

ANALYSIS

The County defendants contend that they are entitled to summary judgment on the following grounds: (1) Deputy Rutherford is entitled to qualified immunity; (2) the County and Sheriff Grey did not act pursuant to any county policy or practice or with deliberate indifference to Deorle's constitutional rights; and (3) Sheriff Grey acted on behalf of the State, not the County, and therefore his conduct cannot

form the basis of any liability attributed to the County. I turn first to Deputy Rutherford's qualified immunity argument.[3]

Deorle alleges that Deputy Rutherford violated his constitutional right to be free from excessive force. When analyzing excessive force claims, courts rely upon the Fourth Amendment and its "reasonableness" standard, Graham v. Connor, 490 U.S. 386, 395 (1989), and courts in the Ninth Circuit treat the qualified immunity inquiry and the inquiry on the merits as one and the same. Hopkins v. Andaya, 958 F.2d 881, 885 n.3 (9th Cir. 1992).

Deputy Rutherford contends that his decision to deploy the beanbag round was objectively reasonable under the circumstances. "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." Tennessee v. Garner, 471 U.S. 1, 11 (1985). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation." Id. at 396-97.

The First Circuit Court of Appeals has explained that Garner "surround[s] the police who make these on-the-spot choices in dangerous situations with a fairly wide zone of protection in close cases." Roy v. City of Lewiston, 42 F.3d 691, 695 (1st Cir. 1994). Thus, resolution in favor of the officer, as a matter of law, of an excessive force claim is proper where "a jury could not find that his conduct was so deficient that no reasonable officer could have made the same choice . . . in circumstances that were assuredly 'tense, uncertain, and rapidly evolving . . .' " Id. (quoting Graham, 490 U.S. at 397). Garner and its progeny are dispositive here.

At various times, Deorle wielded a board with protruding nails, roofing hatchets, a cross-bow and a can of lighter fluid. He threatened

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[3] Where the underlying facts in a case are undisputed, a court must determine the availability of qualified immunity on an officer's motion for summary judgment. Act Up!/Portland v. Bagley, 988 F.2d 868, 873 (9th Cir. 1992).

officers, wandered up and down the street and resisted their attempts to detain him peacefully. By his own admission, Deorle had lost control. In his ultimate act of defiance that day, Deorle charged toward Rutherford and threatened to attack him. Deorle's conduct put Rutherford on the defensive and forced him to act quickly to protect himself. The Supreme Court designed its "calculus of reasonableness" to protect officers who find themselves in such volatile, tense circumstances as those confronting Deputy Rutherford.

Deorle tries to neutralize any perception that he threatened Deputy Rutherford's safety by emphasizing that, at the time Rutherford deployed the beanbag rounds, Deorle had not objects in his hands other than a can of lighter fluid, had no shoes on his feet and stood thirty feet away from Rutherford who had ample backup from other officers on the scene. I cannot concur with plaintiff's view. The factors plaintiff relies on did not make Deorle any less of a threat to Rutherford's safety. Given Deorle's apparent state of mind that afternoon, the absence of shoes on his feet or a weapon in his hand would not have prevented him from attacking Rutherford. Furthermore, the surrounding officers on the scene could do nothing to prevent Deorle's attack outside of deploying less-lethal or lethal ammunition themselves. Deputy Rutherford's only choice aside from deploying the beanbag rounds was to engage Deorle in hand-to-hand combat. The law does not compel such a choice under the circumstances.

The court recognizes that '[be]cause questions of reasonableness are not well-suited to precise legal determination, the propriety of a particular use of force is generally an issue for the jury." Chew v. Gates, 27 F.3d 1432, 1440 (9th Cir. 1994). Nonetheless, in this case, a reasonable jury could not find that no reasonable officer would have made the same decision under the circumstances that confronted Deputy Rutherford. Accordingly, Deputy Rutherford is entitled to qualified immunity against Deorle's excessive force claim.

Because the court concludes, as a matter of law, that Rutherford did not violate Deorle's right to be free from excessive force, there is no basis for holding the County and Sheriff Grey liable either.

IV.

ORDER

For all the foregoing reasons, the court hereby GRANTS the motion for summary judgment filed by the County, Sheriff Grey and Deputy Rutherford.

IT IS SO ORDERED.

DATED: April 8, 1999.

/S/ LAWRENCE K. KARLTON
LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT